

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

IN RE: SOCIAL MEDIA ADOLESCENT
ADDICTION/PERSONAL INJURY
PRODUCTS LIABILITY LITIGATION

This Document Relates to:

All Actions

Case No. [22-md-03047-YGR](#) (PHK)

**ORDER GRANTING-IN-PART AND
DENYING-IN-PART META’S
REQUEST FOR PARTY DISCOVERY
ON THIRD-PARTY STATE AGENCIES
PURSUANT TO FED. R. CIV. P. 34
AND GRANTING META’S FIRST,
SECOND, AND THIRD
ADMINISTRATIVE MOTIONS FOR
LEAVE TO FILE SUPPLEMENTAL
INFORMATION**

Re: Dkts. 685, 738, 1031, 1074, 1110

INTRODUCTION

This case is a multidistrict litigation between various private and public plaintiffs and social media defendants. Now before the Court is a dispute between Defendant Meta Platforms, Inc. (“Meta”) and those thirty-five State Plaintiffs who appear by, and in several cases are themselves, the Attorneys General of various states. Each State Plaintiff is represented by attorneys from the office of their respective State Attorney General. After Meta served requests for production of documents under Federal Rule of Civil Procedure 34 on the State Attorneys General, the Parties disputed whether or not certain identified state agencies should be subject to party discovery, and thus, whether the States Attorneys General should not only collect and produce documents from the Attorney General’s office but also from relevant custodians within the identified state agencies. [Dkt. 685]. The State Attorneys General all object to the document requests for a variety of reasons and, germane to the instant Order, they object to treating their respective state agencies as being subject to party discovery and insist that all of these agencies are third parties from whom Meta

1 should seek documents by subpoenas under Federal Rule of Civil Procedure 45. *Id.* at 8–10. Meta
2 disagrees and contends that the Requests for Production served on the State Attorneys General are
3 the proper vehicle for seeking documents from the identified agencies, and that forcing Meta to
4 serve over 200 subpoenas duces tecum under Rule 45 is not justified and is overly burdensome.

5 Accordingly, the primary issue in dispute is whether the named State Plaintiffs have
6 “control” for purposes of discovery over their respective state agencies’ documents. *See id.* at 6–7,
7 9–10; *see also* Dkt. 738. After careful review of multiple rounds of briefing, the relevant legal
8 standards, and oral argument at multiple hearings, the Court herein sets forth its conclusions of a
9 state-by-state analysis to resolve whether and which named State Plaintiffs have control over their
10 respective state agencies’ documents – and thus whether such documents are to be sought in
11 discovery by requests for production under Rule 34 (party discovery) or by subpoenas under Rule
12 45 (third party discovery). For the following reasons, Meta’s request to compel the State Plaintiffs
13 to include their identified state agencies within the scope of party discovery is **GRANTED-IN-**
14 **PART** and **DENIED-IN-PART**. [Dkts. 685, 738]

15 BACKGROUND

16 On February 23, 2024, Meta sent the State Attorneys General a list of state agencies “that
17 may possess information relevant to the claims or defenses.” Dkt. 685 at 6. Meta served requests
18 for production of documents under Rule 34 on the State Attorneys General on February 27, 2024.
19 [Dkt. 686 at 1]. The Parties subsequently met and conferred, as required by this Court’s Standing
20 Order for Discovery, regarding whether the Parties could reach negotiated resolution of the instant
21 dispute. [Dkt. 685]. The Parties included discussion of this dispute in their Joint Status Report on
22 Discovery filed on February 16, 2024. [Dkt. 617 at 17].

23 The Court heard oral argument on this issue at the Discovery Management Conference
24 (“DMC”) held on February 22, 2024. *See* Dkt. 648. At that hearing, the Court ordered the Parties
25 to submit a chart specifying the state agencies from whom Meta sought discovery, including an
26 indication from the corresponding state Attorney General whether or not that state Attorney General
27 would be representing the identified agencies for purposes of discovery in this case. *Id.* The Parties
28 thereafter submitted the chart to this Court via email.

1 On March 15, 2024, the State Attorneys General and Meta filed a Joint Letter Brief setting
2 forth their respective positions on this dispute over whether the state agencies should be subject to
3 party discovery. [Dkt. 685]. The Parties identified this dispute as a “ripe” dispute in their Joint
4 Status Report on Discovery filed on March 15, 2024. [Dkt. 686 at 8]. The Court heard oral argument
5 on this dispute at the DMC held on March 18, 2024. *See* Dkts. 691, 699. On April 1, 2024, the
6 State Attorneys General and Meta filed their Joint Supplemental Letter Brief on the issue of state
7 agency discovery which included supplemental briefing on a state-by-state basis addressing
8 arguments from each of the thirty-five State Attorneys General and Meta’s rebuttal to each. [Dkt.
9 738,]. As part of that Supplemental Letter Brief was the chart (previously lodged with the Court)
10 identifying the specific state agencies at issue and the indication from each of the State Attorneys
11 General whether or not their office would represent each such agency in discovery in this case. [Dkt.
12 738-1].

13 In the April 12, 2024, Joint Status Report on Discovery, the Parties requested guidance on
14 whether they should be prepared for further oral argument on this dispute. [Dkt. 750 at 8]. By Order
15 dated April 17, 2024, the Court directed the Parties to be prepared to discuss the extent to which
16 additional oral argument regarding this dispute was needed or desired. [Dkt. 759]. At the April 22,
17 2024 DMC, the Court sought the Parties’ views on whether further oral argument was warranted in
18 light of the record presented. *See* Dkts. 777, 782. While Meta did not seek further oral argument,
19 certain State Attorneys General requested further oral argument. On April 24, 2024, pursuant to the
20 Court’s instructions, the State Attorneys General filed a Notice indicating that the states of Arizona,
21 California, New Jersey, and Pennsylvania requested the opportunity to present further oral
22 argument. [Dkt. 787]. The Notice indicated that the “remainder of the State AGs will have their
23 interests represented by a singular argument presented by a member of the State AGs MDL Co-
24 Lead Counsel [unidentified in the Notice].” *Id.* at 2. On May 2, 2024, the State Attorneys General
25 filed an amendment to the Notice, indicating that the “State AGs have reconsidered their position
26 and respectfully amend their request” and indicated that only the states of Arizona, California, New
27 Jersey, and Pennsylvania sought additional oral argument (and thus dropped the request for an
28 additional, as yet unidentified, state Attorney General to also present argument on behalf of the

remainder of the states). [Dkt. 803 at 2]. The remaining State Attorneys General did not seek additional oral argument. *Id.* The Court heard additional oral argument from the Parties at a hearing on May 6, 2024. [Dkt. 818].

On July 24, 2024, the State Attorneys General filed an Administrative Motion for Leave to File Supplemental Information. [Dkt. 1031]. The Administrative Motion sought leave to file information that Meta had served a Notice of its intent to serve twenty-six subpoenas on some of the agencies at issue. *Id.* The Notice indicated that Meta was taking these steps without waiving its rights with regard to this pending dispute. On July 29, 2024, Meta filed its Response to the Administrative Motion, indicating that Meta did not object to the submission of these subpoenas as supplemental information. [Dkt. 1035]. Meta informed the Court that Meta served another twenty-six subpoenas on various state agencies on July 29, 2024. *Id.* at 2 n.1. Meta repeated its stated position that service of these subpoenas without waiving Meta's position that the state agencies should be subject to party discovery. *Id.* at 2. On August 19, 2024, the State Attorneys General filed a Second Administrative Motion for Leave to File Supplemental Information. [Dkt. 1074]. This Second Administrative Motion sought leave to file information that Meta had served an additional Notice of its intent to serve an additional fifty-seven subpoenas on additional agencies at issue. *Id.* at 2. The Notice indicated that Meta takes no position with regard to this Second Administrative Motion. *Id.* at 6.

LEGAL STANDARDS

The following legal standards apply to the Court's analysis of the control issue for each of the states, discussed further below.

I. CONTROL UNDER FED. R. CIV. P. 34

Rule 34 requires a party served with document requests to produce responsive, non-privileged documents which are in that party's possession, custody, or control. Because Rule 34 is written in the disjunctive, control is a separate and sufficient basis for production; issues such as actual possession, legal ownership, and custody are distinct from the issue of control. *Soto v. City of Concord*, 162 F.R.D. 603, 619 (N.D. Cal. 1995) (finding the City of Concord has control of documents of non-employee psychiatrists who evaluated individual officer-defendants); *Bess v.*

1 *Cate*, No. 2:07-cv-1989 JAM JFM, 2008 WL 5100203, at *1 (E.D. Cal. Nov. 26, 2008) (for control
 2 issue “legal ownership of the document is not determinative.”). The Ninth Circuit has held that
 3 “[c]ontrol is defined as the legal right to obtain documents on demand.” *In re Citric Acid Litig.*, 191
 4 F.3d 1090, 1107 (9th Cir. 1999) [hereinafter *Citric Acid*] (quoting *United States v. Int’l Union of*
 5 *Petroleum & Indus. Workers*, 870 F.2d 1450, 1452 (9th Cir. 1989)) (concluding that legal control
 6 test is proper standard under Fed. R. Civ. P. 45). As the party seeking production of documents
 7 under Rule 34, Meta has the burden of proving that a State’s Attorney General has legal control over
 8 (*i.e.*, the legal right to obtain on demand) the identified State’s agencies’ documents. *Hitachi, Ltd.*
 9 *v. AmTRAN Tech. Co.*, No. C-05-2301-CRB (JL), 2006 WL 2038248 at *1 (N.D. Cal. 2006) (citing
 10 *Norman v. Young*, 422 F.2d 470, 472–73 (10th Cir. 1970)).

11 In *Citric Acid*, the Ninth Circuit provided guidance on what is required to show a “legal right
 12 to obtain documents upon demand.” *Citric Acid*, 191 F.3d at 1107. In the factual situation in that
 13 case, the Ninth Circuit focused on whether or not there existed a contract “expressly giv[ing] . . . the
 14 right to obtain the records . . . upon demand.” *Id.* “[T]he cases are fairly uniform that a contractual
 15 obligation to provide documents is dispositive of the issue of control.” *Masimo Corp. v. Shenzhen*
 16 *Mindray Bio–Med. Elecs. Co.*, No. SA CV 12-02206-CJC (DFMx), 2015 WL 12912331, at * 2
 17 (C.D. Cal. Apr. 17, 2015). The Ninth Circuit also explained that, in *Citric Acid*, there was an absence
 18 of “legal control” because the subpoenaed party “lacks the *legal ability* to obtain documents from”
 19 the third party. 191 F.3d at 1107 (emphasis added). Accordingly, based on *Citric Acid* then, either
 20 a contractual right or a legal ability to obtain documents are factors sufficient to show “legal control”
 21 over documents for purposes of Rule 34.

22 In *Citric Acid*, the Ninth Circuit further explained that an indicator of a lack of legal control
 23 occurs when the allegedly controlled third party can refuse to provide documents without legal or
 24 other repercussions:

25 C&L–US [(the subpoenaed party)] asked C&L–Switzerland [(the
 26 third-party allegedly under control)] to produce those documents, but
 27 C&L–Switzerland refused. There is no mechanism for C&L–US to
 28 compel C&L–Switzerland to produce those documents, and it is not
 clear how Varni wants C&L–US to go about getting the ECAMA
 documents, since C&L–Switzerland could legally—and without
 breaching any contract—continue to refuse to turn over such

documents.

Citric Acid, 191 F.3d at 1108.

Thus, under *Citric Acid*, a “mechanism” to compel the third party to produce the documents, such as an ability to enforce a legal duty under a contract, would demonstrate legal control (and in the facts of *Citric Acid*, no such contractual mechanism existed).

Subsequent to *Citric Acid*, the Ninth Circuit has not delineated with precision what other factors are sufficient to show a “legal right to obtain documents upon demand.” *See, e.g., In re Legato Sys., Inc. Sec. Litig.*, 204 F.R.D. 167, 169 (N.D. Cal. 2001) (observing that while *Citric Acid*’s legal control test “has been accepted within this circuit in discussions of both Rule 34(a) and 45(a)[,] . . . there has been little discussion as to precisely what is meant by ‘legal right’ and ‘upon demand’”).

Courts agree that the *Citric Acid* legal control test is a fact specific inquiry. *See Perez v. State Farm Mut. Auto. Ins. Co.*, No. C-06-01962 JW (PSG), 2011 WL 1362086, at *2 (N.D. Cal. Apr. 11, 2011) (“The determination of control is often fact-specific.”); *Miniace v. Pac. Maritime Ass’n*, No. C 04-03506 SI, 2006 WL 335389, at *1 (N.D. Cal. Feb. 13, 2006) (“‘Legal right’ is evaluated in the context of the facts of each case.”). Because the inquiry is fact specific, no court has attempted to limit or compile all factors relevant to an analysis under the *Citric Acid* legal control test.

As a general matter, “[f]ederal courts have interpreted ‘control’ broadly.” *Hitachi*, 2006 WL 2038248, at *1 (finding legal control and granting motion to compel Hitachi to search and produce documents from third party, Hitachi’s licensing agent Inpro); *Miniace*, 2006 WL 335389, at *1 (“‘Control’ need not be actual control; courts construe it broadly as ‘the legal right to obtain documents upon demand.’”). “The definition of control under Rule 34 includes situations well beyond those which would permit a finding of *in personam* jurisdiction or liability based on an alter ego situation.” *Almont Ambulatory Surgery Ctr., LLC v. UnitedHealth Grp. Inc.*, No. CV 14-03053 MWF (AFMx), 2018 WL 1157752, at *21 (C.D. Cal. Mar. 2, 2018) (citation omitted).

Because determination of the issue of control is fact specific depending on the totality of circumstances, there are no fully exhaustive lists of factors which have been found relevant to

determining control. However, helpfully, at least one federal district court approaching this issue has surveyed the case law:

[T]here are a number of factors which may be distilled from case law which help to determine when documents in the possession of one corporation may be deemed under control of another corporation. These factors focus on the other corporation's actual control or inferred control, including any "complicity" in storing or withholding documents. They include (a) commonality of ownership, (b) exchange or intermingling of directors, officers or employees of the two corporations, (c) exchange of documents between the corporations in the ordinary course of business, (d) any benefit or involvement by the non-party corporation in the transaction, and (e) involvement of the non-party corporation in the litigation [B]ecause of the ownership situation, there often exists some intermingling of directors, officers, or employees, or business relations. Consequently, the subsidiary may be required to respond to a Rule 34 request which includes the parent company's documents. Sister corporations are subject to the same analysis.

Uniden Am. Corp. v. Ericsson Inc., 181 F.R.D. 302, 306–07 (M.D.N.C. 1998) (internal citations omitted).

Further, as noted, the *Citric Acid* approach to control includes evaluation of whether there is a legal right to access the documents. *Citric Acid*, 191 F.3d at 1107. Accordingly, under a straightforward application of the "legal right" standard, where a statute (or similar legal mandate) provides a right to obtain documents, that statute or legal mandate has been held to be sufficient to demonstrate control over third party's documents for purposes of discovery. *See In re ATM Fee Antitrust Litig.*, 233 F.R.D. 542, 544–45 (N.D. Cal. 2005) ("by federal statute, a bank holding company necessarily controls its subsidiary banks. . . . Therefore, if [third party] BANA or any other wholly-owned subsidiary bank of [defendant] BAC has possession and custody of documents responsive to Plaintiffs' requests, then [defendant] BAC has legal control of the documents through its control of the [third-party] subsidiary bank and must produce any which are responsive to Plaintiffs' Rule 34 requests."). For purposes of establishing "legal control" over documents, "[d]ecisions from within this circuit have noted the importance of a legal right to access documents created by statute, affiliation or employment." *In re Legato Sys., Inc. Sec. Litig.*, 204 F.R.D. at 170 (emphasis added) (finding "legal control" and ordering party to obtain and produce transcript not within current possession where federal regulation, 17 C.F.R. § 203.6, grants legal right to ask for

1 and obtain transcript of testimony from SEC). Therefore, in the analysis of individual states below,
2 the Court will consider whether there exists a statute or other legal mandate which satisfies the
3 control test.

4 Despite their request for state-by-state briefing and separate opportunities for oral argument
5 from each state, throughout the briefing and oral argument, the Attorneys General of the individual
6 states raise several arguments that implicate the same or similar legal issues. The Court turns to
7 these common legal issues and the legal standards applicable to all of the states' objections to party
8 discovery for their agencies and, to avoid prolixity, addresses them here instead of repeating them
9 in the discussion of each state's arguments.

10 **II. STATE LAW AND CONTROL UNDER FED. R. CIV. P. 34**

11 The instant dispute involves document requests served upon governmental entities.
12 However, the Court notes that precedent regarding the application of the control factors in the
13 context of document requests made upon private corporations or entities may be illustrative. In a
14 case involving the New York Attorney General, the Supreme Court held that "[i]f a State chooses
15 to pursue enforcement of its laws in court, then it is not exercising its power of visitation and will
16 be treated like a litigant. *An attorney general acting as a civil litigant must* file a lawsuit, survive a
17 motion to dismiss, *endure the rules of procedure and discovery*, and risk sanctions if his claim is
18 frivolous or his discovery tactics abusive." *Cuomo v. Clearing House Ass'n, L.L.C.*, 557 U.S. 519,
19 531 (2009) (emphasis added). The Ninth Circuit has held that "[w]hen the government is named as
20 a party to an action, it is placed in the same position as a private litigant, and the rules of discovery
21 in the Federal Rules of Civil Procedure apply." *Exxon Shipping Co. v. U.S. Dep't of Int.*, 34 F.3d
22 774, 776 n.4 (9th Cir. 1994). Not surprisingly then, the fact that this case involves governmental
23 entities rather than private entities does not materially change the legal or analytical approach to the
24 control issue.

25 Nevertheless, the Court is cognizant that governmental agencies differ from private entities
26 in certain ways, as stressed by the state Attorneys General. These differences are accounted for in
27 the analyses below. However, because the Court is not relying on the law of private corporations
28 or corporate governance to analyze the control issue here, the differences are not in and of

1 themselves outcome determinative of the inquiry. For example, the fact that private corporations
 2 are legal entities formed under state law, whereas the state Attorney General is (typically) an office
 3 created by a state constitution, has little bearing on distinguishing precedent on the issue of control.
 4 Other than pointing out these kinds of public/private differences, the Attorneys General do not
 5 demonstrate how or why the legal precedent cited are distinguishable based on the legal (or
 6 constitutional) source of creation of the entities for deciding the control issue. From the Court's
 7 review, the precedent relevant to the issues here do not apply a different legal control test based on
 8 whether an entity is a for-profit business as opposed to a governmental agency or officer.

9 Because the inquiry for control is fact-specific, courts have examined the state's
 10 constitutional or statutory scheme as part of the totality of circumstances when deciding whether
 11 one governmental entity has control over the documents of another governmental entity. *See, e.g.,*
 12 *United States v. Am. Express Co.*, No. 10-CV-04496-NGG (RER), 2011 WL 13073683 (E.D.N.Y.
 13 July 29, 2011) [hereinafter *Amex*]; *Bd. of Educ. of Shelby Cnty., Tenn. v. Memphis City Bd. of Educ.*,
 14 No. 2:11-CV-02101-SHM, 2012 WL 6003540 (W.D. Tenn. Nov. 30, 2012), *supplemented*, No.
 15 2:11-CV-02101-SHM, 2012 WL 6607288 (W.D. Tenn. Dec. 18, 2012); *Washington v. GEO Grp.,*
 16 *Inc.*, No. 3:17-CV-05806-RJB, 2018 WL 9457998, at *3 (W.D. Wash. Oct. 2, 2018); *In re Generic*
 17 *Pharms. Pricing Antitrust Litig.*, 571 F. Supp. 3d 406 (E.D. Pa. 2021) [hereinafter *Generic*
 18 *Pharmaceuticals (I)*]; *Illinois ex rel. Raoul v. Monsanto Co.*, No. 22 C 5339, 2023 WL 4083934
 19 (N.D. Ill. June 20, 2023) [hereinafter *Monsanto*]; *In re Generic Pharms. Pricing Antitrust Litig.*,
 20 699 F. Supp. 3d 352 (E.D. Pa. 2023) [hereinafter *Generic Pharmaceuticals (II)*].

21 Ultimately, the control issue under Rule 34 is governed by federal law. A federal district
 22 court has the authority under federal law to order disclosure of documents in discovery in civil
 23 actions, notwithstanding state law which put limits on such disclosure. *Gonzales v. Spencer*, 336
 24 F.3d 832, 834–35 (9th Cir. 2003) (Although state law limited prosecutor's access to juvenile records,
 25 "the court could have ordered disclosure notwithstanding state law[.]"). District court opinions have
 26 recognized that a state law restriction on producing documents is not a barrier to a finding of control,
 27 and thus, have ordered production of a third-party agency's documents as part of party discovery.
 28 *See, e.g., Doe v. Cnty. of Santa Clara*, No. 15-cv-01725-EJD (HRL), 2015 WL 14073467, at *1

(N.D. Cal. Nov. 30, 2015) (“Federal courts may grant lawyers permission to view juvenile case files in spite of California’s contrary confidentiality laws, however, because federal privilege law controls who may access evidence”); *Evans v. City of Tulsa*, No. 08-CV-547-JHP-TLW, 2009 WL 3254907, at *2 (N.D. Okla. Oct. 7, 2009) (ordering the defendant municipality in case involving both federal and state law claims to produce documents from three agencies (county clerk, district attorney, and Family and Children Services) and stating that “[i]n federal questions cases, federal courts are not bound by state statutes which impose limits on the discovery process”).

Similarly, federal regulations, even when interpreted with the force of law, cannot be enforced if they purport to override the Federal Rules of Civil Procedure. *In re Bankers Tr. Co.*, 61 F.3d 465, 470–71 (6th Cir. 1995) [hereinafter *Bankers Trust*]. In *Bankers Trust*, the Federal Reserve Board refused to produce documents because a federal regulation barred their production absent following procedures to request such documents via separate action in district court in Washington, D.C. *Id.* at 469. The *Bankers Trust* opinion analyzed the conflict between the federal regulation and Rule 34, and concluded that the Federal Rules of Civil Procedure govern whether the documents should be produced:

We likewise conclude that Congress did not empower the Federal Reserve to prescribe regulations that direct a party to deliberately disobey a court order, subpoena, or other judicial mechanism requiring the production of information. We therefore hold that the language in 12 C.F.R. § 261.14 that requires a party that is served with a subpoena, order, or other judicial process to continually decline to disclose information or testimony exceeds the congressional delegation of authority and cannot be recognized by this court. Such a regulation is plainly inconsistent with Rule 34 and cannot be enforced. To allow a federal regulation issued by an agency to effectively override the application of the Federal Rules of Civil Procedure and, in essence, divest a court of jurisdiction over discovery, the enabling statute must be more specific than a general grant of authority as found here.

Moreover, we find no compelling reason to discard the relatively straightforward discovery methods outlined in the Federal Rules of Civil Procedure simply because the Federal Reserve has attempted to mandate a different procedure.

Id. at 470–71.

Analogously, the Supreme Court has recognized that discovery in a federal civil action is controlled by federal law, and that a finding of control over documents cannot be disregarded even

in situations where foreign law would potentially impose criminal sanctions for producing the documents. *Societe Internationale Pour Participations Industrielles Et Commerciales, S. A. v. Rogers*, 357 U.S. 197, 205–06 (1958). Thus, discovery laws and corporate laws rooted in a different sovereign are insufficient to override the application of the “legal control” test. *Japan Halon Co. v. Great Lakes Chemical Corp.*, 155 F.R.D. 626, 627 (N.D. Ind. May 28, 1993) (finding subsidiary has control over parent corporation documents and rejecting argument that “international interpretation of its corporate structure and the Japanese discovery law result in the conclusion that its does not have the requisite control over documents in possession of its parent companies”). Furthermore, the *Uniden* Court explained that “[t]he expanded definition of control under Rule 34 was signaled by the Supreme Court’s decision in *Societe Internationale*.” *Uniden*, 181 F.R.D. at 306. As the *Uniden* Court explained further:

This [Supreme Court] language indicates a direction to lower courts to closely examine the actual relationship between two corporations and guard against not just fraud and deceit, but also sharp practices, inequitable conduct, or other false and misleading actions whereby corporations try to hide documents or make discovery of them difficult. Certainly, this broad construction of Rule 34 is consonant with American civil process which puts a premium on disclosure of facts to ascertain the truth as the means of resolving disputes.

Id.

In the same regard, the Ninth Circuit has held that a federal statute (and federal regulations promulgated thereunder) cannot serve as a basis for a government agency to refuse to provide discovery. *Exxon Shipping*, 34 F.3d at 776–78 (rejecting government agencies’ refusals of subpoenaed depositions based on both federal statute and regulations). The Ninth Circuit held long ago that agency regulations (and the statutes under which the regulations were promulgated) are not proper barriers to production of documents where control has been found. *Harvey Aluminum (Inc.) v. N.L.R.B.*, 335 F.2d 749, 753 (9th Cir. 1964) (“Whether the compulsion of the rule [for an agency to produce documents] is constitutional or statutory, the Board may not avoid it by adopting regulations inconsistent with its requirements.”).

The import of these precedents is that, if a court finds control over documents, then neither federal statute nor federal regulation (nor foreign law) are a legal bar to application of Rule 34 and

1 requiring production based on that finding of control. To the extent the state Attorneys General
 2 argue that a state statute would excuse or bar production of the agencies' documents even where the
 3 Court finds control, then for similar reasons that argument is legally unsound. Here, the Multistate
 4 Complaint asserts claims under the Federal Children's Online Privacy Protection Act ("COPPA")
 5 on behalf of all the Filing States. *See California v. Meta Platforms, Inc.*, No. 23-cv-05448, at Dkt.
 6 1, ¶¶ 851-59 (N.D. Cal. Oct. 24, 2023) [hereinafter Multistate Complaint]. "[I]n cases presenting
 7 federal questions, such as here, *discoverability*, privileges and confidentiality *are governed by*
 8 *federal law*, not state law." *Garner v. City of New York*, No. 17-CV-843 (JGK)(KNF), 2018 WL
 9 5818109, at *3 (S.D.N.Y. Oct. 17, 2018) (civil rights case asserting both federal and state law causes
 10 of action) (emphasis added).

11 While courts have considered the impact of state constitutions and state laws in analyzing
 12 the issue of control where governmental entities are involved, comity-based arguments do not
 13 require a finding of a lack of control as a matter of law. Precedent makes clear that notions of comity
 14 or arguments about the supremacy of state law (including even a co-pending state court proceedings)
 15 are not sufficient to bar a party seeking discovery in a federal court under federal law. *In re*
 16 *PersonalWeb Techs., LLC Pat. Litig.*, No. 18-md-02834-BLF, 2022 WL 19833889, at *1 (N.D. Cal.
 17 Apr. 12, 2022) (rejecting comity arguments as bases to bar motion to compel enforcement of third
 18 party subpoenas in federal court where state law receivership action was co-pending and noting that
 19 "[i]t is settled law that state courts have no authority to bar – by injunction or otherwise – the
 20 prosecution of *in personam* actions in federal courts").

21 **III. SEPARATION AND INDEPENDENCE OF A STATE ATTORNEY GENERAL** 22 **FROM THE EXECUTIVE BRANCH OF THE STATE**

23 The state Attorneys General all argue, using almost identical verbiage, that the office of their
 24 state Attorney General is either a separate constitutional officer, separately elected, and/or with
 25 separate spheres of authority which make that office independent from the local office of the
 26 Governor, which includes all the identified state agencies within the executive branch of that State.
 27 *See* Dkt. 685 at 9–10. This argument relies on either the state constitution or state laws defining the
 28 roles of the different state officers, and as such, the above discussion regarding how state law does

1 not override federal law applies with equal force. Further, based on this separation of powers
2 argument, the state Attorneys General argue that they are not the state officers ultimately overseeing
3 the state agencies (the Governor being that officer). They argue, for that reason, that the state
4 Attorneys General have no control over those agencies. *Id.* at 10. Indeed, some courts deciding a
5 control issue in the context of governmental entities have put weight on the separation of powers
6 issue under the facts of established there. *In re Gold King Mine Release in San Juan Cnty.*, No.
7 1:18-MD-02824-WJ, 2020 WL 13563527 at *3–4 (D.N.M. Dec. 23, 2020).

8 However, with further examination, these arguments focusing on a dual executive under a
9 state constitution (from which stems the separation of powers between a state Attorney General and
10 a state Governor) are not entirely persuasive. Corollary arguments that the state Attorneys General
11 have no executive authority over the state agencies (such as “[t]hey do not set agency priorities,
12 cannot discipline agency employees”) are equally unpersuasive. *See* Dkt. 685 at 9–10. These
13 arguments ignore the reality that the “legal control” issue for discovery arises when there are two
14 legally distinct or separate entities. If the mere fact that two separately constituted or formed entities
15 were enough to defeat control, then there would almost never be a finding of control. Indeed, in the
16 analogous situation where two “sister corporations” are involved, courts have found control of one
17 entity over the documents of another. *See Uniden*, 181 F.R.D. at 307–08 (finding control as between
18 two “sister corporations” where neither was under the corporate authority of the other). This
19 illustrates the point: if one of two “sister corporations” can be found to have control over documents
20 of the other, then for the same reasons, one of two parts of a split or dual executive can be found to
21 have control of documents of the other.

22 The state Attorneys General emphasize the separateness of the agencies from the Attorney
23 General without explanation as to how specifically that separation affects control as to the
24 documents at issue. If only one entity were involved, then by definition that single entity would
25 “possess” the documents under Rule 34 and the disjunctive issue of control would not arise.
26 *Illumina Cambridge Ltd. v. Complete Genomics, Inc.*, No. 19-mc-80215-WHO (TSH), 2020 WL
27 820327, at *8–9 (N.D. Cal. Feb.19, 2020). Whether or not there is a “dual executive” or separation
28 of powers is not by itself dispositive of the control issue. Analogously, in the context of corporate

1 entities, lack of ownership interests by one corporation of another is not sufficient to defeat a finding
 2 of control. *See QC Labs v. Green Leaf Lab LLC*, No. 8:18-cv-01451-JVS (JDEx), 2019 WL
 3 6797250, at *8–9 (C.D. Cal. July 19, 2019) (finding control even though two entities “are not in a
 4 parent-wholly owned subsidiary relationship, nor do the two entities have identical ownership
 5 structure”). To the extent some precedent cited by the state Attorneys General have relied on policy-
 6 based reasons rooted in comity for finding a lack of control by an Attorney General over a state
 7 agency, those decisions are distinguishable because they do not apply the Ninth Circuit’s *Citric Acid*
 8 test (for example, state Attorneys General cite a state intermediate appellate court opinion, *People*
 9 *ex rel. Lockyer v. Superior Ct.*, 19 Cal. Rptr. 3d 324 (Cal. Ct. App. 2004), which did not apply Rule
 10 34); they involve a factual record different from the record here; and they appear not to involve or
 11 consider factors such as commonality of counsel, commonality of interests, or the discussion of the
 12 supremacy of federal law in this inquiry (informed at least in part by the Supreme Court’s directive
 13 in *Societe Internationale* and the cases cited above). [Dkt. 685 at 9–10].

14 The existence of a separation of powers between a state Attorney General and a Governor
 15 may be a factor in the control analysis, but that factor does not necessarily preclude the Attorney
 16 General’s legal right to access to state agency documents. The logical fallacy of the “separation of
 17 powers” argument is that this concept concerns distinct spheres of governmental authority to act
 18 within their roles as arms of the government and does not necessarily impact whether or not there is
 19 control of documents for purposes of discovery. To be clear, control under Rule 34 is a discovery
 20 concept and is not subject of the exact same conceptual bounds of “corporate control” (as a parent-
 21 subsidiary) or “operational control” (such as setting agency policy or disciplining agency
 22 employees, as the state Attorney Generals argue). Where one entity is under the day-to-day
 23 operational control of another, that factual situation has been found to be a factor in finding control,
 24 because such unfettered power to control all the operations of another entity would indicate a legal
 25 right to obtain the documents (again, such as in a parent-subsidiary situation). *See In re ATM Fee*
 26 *Antitrust Litig.*, 233 F.R.D. at 545; *see also LG Display Co., Ltd. v. Chi Mei Optoelectronics Corp.*,
 27 No. 08CV2408-L (POR), 2009 WL 223585, at *3 (S.D. Cal. Jan. 28, 2009) (“Numerous courts have
 28 concluded that a parent corporation has a sufficient degree of ownership and control over a wholly-

1 owned subsidiary that it must be deemed to have control over documents located with that
2 subsidiary.”).

3 But, the converse is not necessarily true: lack of operational, day-to-day control of an entity
4 does not end the inquiry, as the state Attorneys General argue – otherwise, control would never be
5 found in situations except those involving a parent-subsidary or similar direct-control type of
6 relationship. For example, in *Choice-Intersil Microsystems, Inc. v. Agere Sys.*, the Court found that
7 a subsidiary corporation had control of the documents of its parent corporation for purposes of
8 discovery, despite the fact that the subsidiary by definition lacked corporate or operational control
9 over the parent corporation. *Choice-Intersil Microsystems, Inc. v. Agere Sys.*, 224 F.R.D. 471, 472–
10 73 (N.D. Cal. 2004) (finding subsidiary has control of documents of parent corporation); *see also*
11 *Uniden*, 181 F.R.D. at 307–08 (finding control as between two “sister corporations” where neither
12 was under the corporate authority of the other). ““The control analysis for Rule 34 purposes does
13 not require the party to have actual managerial power over the foreign corporation, but rather that
14 there be close coordination between them.”” *St. Jude Medical S.C., Inc. v. Janssen-Counotte*, 305
15 F.R.D. 630, 638 (D. Or. 2015). Here, the attorney-client relationship between the state Attorneys
16 General and their respective state agencies (a relationship mandated by state law) necessitates close
17 coordination. Thus, although operational control may be a factual situation which demonstrates a
18 legal right to obtain the documents, the absence of such “managerial power” in terms of day-to-day
19 operations or policy making is not determinative for evaluating “control” for purposes of discovery.

20 Similarly, to the extent the State Attorneys General argue that they lack “unfettered access”
21 or some otherwise unbounded right to access state agencies’ documents, such argument is legally
22 incorrect. A determination of “control” of documents, for purposes of Rule 34, does not require
23 showing “unfettered access” to all state agencies’ documents under all circumstances. *Monsanto*,
24 2023 WL 4083934, at *5 (“Despite the State’s characterization of the issue, we need not decide
25 whether the Illinois Attorney General has “unfettered access to all state agencies’ records under all
26 circumstances.” Rather, the issue is one of “control” under Rule 34 – nothing more, nothing less.”).
27 Further, the state Attorneys General implicitly assume an overly restrictive view of the control test
28 for documents under Rule 34. To the contrary, courts have recognized that control for purposes of

document discovery is liberally construed. *E.g.*, *Miniace*, 2006 WL 335389, at *1; *Evans v. Tilton*, No. 1:07CV01814 DLB PC, 2010 WL 1136216, at *1–2 (E.D. Cal. Mar. 19, 2010); *Inland Concrete Enterprises, Inc. v. Kraft Americas LP*, No. CV 10-1776-VBF (OPX), 2011 WL 13209239, at *3–4 (C.D. Cal. Feb. 3, 2011).

Indeed, control of documents in the split-governmental context is amply demonstrated by a Western District of Tennessee decision. *Bd. of Educ. of Shelby Cnty., Tenn.*, 2012 WL 6003540, at *3. In that case, the Court found that the Tennessee Attorney General had control of the documents of the “Tennessee General Assembly, its legislators, representatives, or agents” – despite the fact that the state’s legislature is not under executive control or authority of the state’s Attorney General. *Id.* Clearly, under the Tennessee state constitution, the Attorney General does not exert supervisory control over the Tennessee legislature. But that factor was not determinative of the control issue for documents under Rule 34. “Control” for purposes of discovery is not coterminous with the concept of “functional control” or “political control”.

Ultimately, the argument that state agencies are outside a state Attorney General’s executive authority is merely another way to restate that there are two distinct entities involved. Seen for what it is, that argument amounts to nothing more than restating the issue to be decided, without helping to decide the issue. Similarly, arguing that the state agencies are independent because there is a “divided executive” under a state constitution again improperly conflates the “legal control” issue for discovery of documents with “operational control” or “functional independence.” Under the legal standards discussed, the Court finds these arguments and these alleged factors to be ultimately unhelpful in determining whether or not there is control for purposes of discovery, because these arguments beg the issue and as such are not outcome determinative of the control issue.

IV. COMMONALITIES BETWEEN THE STATES, THE STATE ATTORNEYS GENERAL, AND THE STATE AGENCIES

There are thirteen cases in this Multi-District Litigation in which the States themselves are the named plaintiffs and in which the Attorney General of that State is not named as co-plaintiff (but is rather counsel representing the plaintiff). *See* Multistate Complaint (naming California, Connecticut, Idaho through its Attorney General, Illinois, Indiana, Kentucky, Louisiana, Maine,

Minnesota by its Attorney General, New York by its Attorney General, Pennsylvania by its Attorney General, Rhode Island, and Wisconsin as plaintiffs). Further, there are nineteen cases in this Multi-District Litigation in which both the State itself and the Attorney General (as relator) are the named co-plaintiffs, and thus both entities are represented by the Attorney General of that State. *Id.* (naming “*ex rel.*” the Attorney Generals of Arizona, Colorado, Delaware, Georgia, Hawai’i, Kansas, Michigan, Missouri, Nebraska, North Carolina, North Dakota, Ohio, Oregon, South Carolina, South Dakota, Virginia, Washington, and West Virginia); *see also Montana v. Meta Platforms, Inc.*, No. 24-cv-00805, at Dkt. 1 (N.D. Cal. Dec. 1, 2023) (Montana Complaint naming “State of Montana, *ex rel.* Austin Knudsen, Attorney General” as “Plaintiffs”); *see also U.S. ex rel. Longhi v. Lithium Power Techs., Inc.*, 481 F. Supp. 2d 815, 823 n.6 (S.D. Tex. 2007) (“the Fifth Circuit has expressly held that relator is a party to the suit.”); *accord Power Authority ex rel. Solar Liberty Energy Sys. v. Advanced Energy Indus.*, No. 19-CV-1542-LJV-JJM, 2024 WL 957788, at *2 (W.D.N.Y. Mar. 6, 2024).

In all thirty-two cases, the State itself is a party to the suit. Courts have found that discovery obligations extend to other government agencies even if they are non-parties based on the recognition that the State (or the government as a whole) is essentially the real party in interest and thus the discovery obligation extends to the entire government. In an analogous case involving an order for the production of documents from a non-party agency proceeding, the Ninth Circuit held that:

[t]he rationale of the rule [requiring production of the documents, witness statements] . . . applies with equal vigor whether the statements are in the possession of the agency conducting the hearing ***or of another agency of the government*** The [National Labor Relations] Board, the Department of Justice, and the Department of Labor are all parts of the government of the United States. The proceedings which the Board initiated against petitioners were public proceedings, undertaken on behalf of that government to enforce a public Act. In a criminal prosecution the Department of Justice would scarcely be heard to say that it was not required to produce statements otherwise within the rule ***simply because the documents rested in the hands of another federal agency***, and we perceive no valid distinction, for this purpose, between that case and this one.

Harvey Aluminum, 335 F.2d at 754 (citations omitted) (emphasis added); *cf. also Bank Line v. United States*, 76 F. Supp. 801, 803–04 (S.D.N.Y. 1948) (ordering production of documents from

1 non-party, the Department of the Navy, noting that “[t]he several departments are all agencies of
2 one government, possessed, theoretically, at least, of a single will” where “suit is prosecuted by the
3 Department of Justice for the benefit of the Treasury Department, and that the Navy Department [is]
4 not exercising any discretion as to institution of litigation.”).

5 This rationale has been applied to the governments of other nation states, such as in a case
6 involving Ghana: “When an agency of government institutes suit, any obligation to disclose relevant
7 information extends to the government Qua government requiring disclosure of all documents in its
8 possession, custody or control, not just those materials in the immediate possession of the particular
9 agency-plaintiff.” *Ghana Supply Comm’n v. New England Power Co.*, 83 F.R.D. 586, 595 (D. Mass.
10 1979).

11 Under different factual situations, state agencies have been found to be agents of their
12 respective States. *See, e.g., San Francisco NAACP v. San Francisco Unified School Dist.*, 484 F.
13 Supp. 657, 667 (N.D. Cal. 1979) (collecting cases which “have found liability [of a State] under an
14 agency theory” involving school boards); *In re Airport Car Rental Antitrust Litig.*, 521 F. Supp.
15 568, 586–87 (N.D. Cal. 1981), *aff’d*, 693 F.2d 84 (9th Cir. 1982) (“Air travelers require ground
16 transportation and it would follow that the [airport operating agency Air] Board, as the agent of the
17 state in performing this function, would have a duty to provide adequate and reliable services.”)
18 (quoting *Padgett v. Louisville & Jefferson Cnty. Air Bd.*, 492 F.2d 1258, 1260 (6th Cir. 1974)); *San*
19 *Francisco Unified Sch. Dist. v. Johnson*, 479 P.2d 669, 677 (Cal. 1971) (“the state [of California]
20 has created local school districts, whose governing boards function as agents of the state.”);
21 *Crumpler v. Bd. of Admin.*, 108 Cal. Rptr. 293, 305 (Cal. Ct. App. 1973) (finding Board of
22 Administration of Public Employees’ Retirement System and city of Mendocino “were agents of
23 the state [of California]” in administering that retirement system). A principal-agent relationship
24 has been held to be a factor that supports a finding of control for purposes of discovery. *Lofton v.*
25 *Verizon Wireless (VAW) LLC*, No. 13-cv-05665-YGR (JSC), 2014 WL 10965261, at *2 (N.D. Cal.
26 Nov. 25, 2014); *Hitachi*, 2006 WL 2038248 at *1; *Rosie v. Romney*, 256 F. Supp. 2d 115, 118 (D.
27 Mass. 2003). Meta argues that the agencies at issue are under the control of their respective State,
28 and therefore subject to party discovery. *See* Dkt. 685 at 6–7 (citing cases).

1 However, the state Attorneys General argue that other courts have recognized that Rule 34
 2 should not be interpreted to allow party discovery of every agency of a state government, merely
 3 because suit was filed in the name of the State absent a showing of some other factors demonstrating
 4 control. *Id.* at 9 (citing cases). As with other factors impacting the control issue, the case law makes
 5 clear that this factor is one among the totality of circumstances to be considered in deciding whether
 6 or not there is control. *See Colorado v. Warner Chilcott Holdings*, No. 05-02182, 2007 WL
 7 9813287, at *4 (D.D.C. May 8, 2007) (The Court “will not aggregate separate state governmental
 8 agencies without a strong showing to the contrary by Defendants[.]”). The *Amex* opinion followed
 9 *Warner Chilcott Holdings* in finding that the state Attorneys General lacked control over their
 10 respective agencies’ documents because that court granted “great deference” to the dual executive,
 11 separate agency factors. *Amex*, 2011 WL 13073683, at *2. As recognized by *Warner Chilcott*
 12 *Holdings*, court can take this factor into account under the totality of the circumstances for
 13 evaluating control for each state. *Warner Chilcott Holdings*, 2007 WL 9813287, at *4

14 A more specific concept of “independence” involves the state Attorney General’s
 15 independent discretion to file a lawsuit. The state Attorneys General argue that, by pursuing these
 16 civil enforcement actions, the state Attorneys General are acting within their exclusive independent
 17 authority under their state constitutions and that this independent prosecutorial authority does not
 18 require involvement of any state agencies (with exceptions for certain states where specific agencies
 19 are, in fact, required to approve and proceed with the litigation). The *Generic Pharmaceuticals (II)*
 20 Court rejected the argument that, because the Attorney General was suing as an independent agency,
 21 it necessarily lacked control over other agencies’ documents. *Generic Pharmaceuticals (II)*, 699 F.
 22 Supp. 3d at 358. As that Court noted, the District of Columbia’s “Attorney General has ‘broad
 23 power to exercise all such authority as the public interest requires’ and has ‘wide discretion in
 24 determining what litigation to pursue to uphold the public interest, absent specific constitutional or
 25 statutory guidance to the contrary.’” *Id.* The *Generic Pharmaceuticals (II)* Court reasoned that
 26 “[t]his broad authority, in the context of litigation where the AGO is representing the District of
 27 Columbia, does not support the position that the AGO cannot exercise its authority to obtain
 28 documents from other agencies.” *Id.*

Conversely, in *Amex*, that Court relied on the factor that “the decision to pursue an enforcement action against Amex was one of policy, made independently of the State Governors and state agencies” as a basis to find a lack of control. *Amex*, 2011 WL 13073683, at *2. However, the *Amex* Court failed to address or apparently consider the point considered by the *Generic Pharmaceuticals (II)* opinion: such broad authority on the part of the state Attorneys General (in filing the litigation) would in fact be consistent with having a right to exercise authority to obtain documents from other agencies (and at least would be inconsistent with a lack of such authority). Compare *Generic Pharmaceuticals (II)*, 699 F. Supp. 3d at 358, with *Amex*, 2011 WL 13073683, at *2.

Indeed, courts have found when a state Attorney General initiates litigation on behalf of the state, and thus exercises authority to file a lawsuit *parens patriae*, that Attorney General has legal control over agency documents. See, e.g., *GEO Grp., Inc.*, 2018 WL 9457998, at *3 (“In this Court’s view, where the plaintiff is the State of Washington, discovery addressed to the State of Washington includes its agencies. Because the AGO is the law firm to the State of Washington, the AGO should respond to and produce discovery on behalf of the State of Washington, including its agencies.”); *Compagnie Francaise d’Assurance Pour le Com. Exterieur v. Phillips Petroleum Co.*, 105 F.R.D. 16, 35 (S.D.N.Y. 1984) (where an “agency of government institutes suit, any obligation to disclose relevant information extends to the government qua government requiring disclosure of all documents in its possession, custody or control, not just those materials in the immediate possession of the particular agency-plaintiff”); see also *United States v. AT&T*, 461 F. Supp. 1314, 1333–34 (D.D.C. 1978) (“The Attorney General . . . [is] responsible for instituting and conducting the criminal and civil litigation of the United States[]” “it hardly seems reasonable to insulate the entire government, other than the Attorney General’s Office, from the direct discovery process.”).

Similarly, many of the state Attorneys General argue that the non-party agencies are not parties to this case, and thus they are by definition not subject to party discovery. The short response to this circular argument is that Rule 34 reaches non-parties where there is control, so a third party’s status as a third party to the case is no basis on which to find a lack of control. This argument ignores the many cases in which a non-party was found properly subject to party discovery under

1 Rule 34 because the named party had control over the non-party's documents. *See, e.g., League of*
 2 *United Latin Am. Citizens v. Abbott*, No. 21-CV-00299, 2022 WL 1540589 at *1–2 (W.D. Tex. May
 3 16, 2022) (“In many examples the United States points to, Texas has demonstrated its control over
 4 documents held by non-party agencies or officials The Court finds that Texas has control over
 5 documents and ESI that are held by [the Office of the Governor], [the Office of the Attorney
 6 General], and any other executive agency known to the State to be in the possession, custody, or
 7 control of relevant documents. Because Texas has control over these items, it must produce the
 8 items responsive to the United States’ Rule 34 production request.”).

9 V. “VIRTUAL VETO”

10 Throughout their briefs and at oral argument, the state Attorneys General stressed the
 11 “dual/divided executive” of their constitutional structures of their local governments. The Court is
 12 mindful of the nature of state governance and has taken it into account as appropriate. Indeed, courts
 13 have discussed the unique positions in which state Attorneys General sit within a state government.
 14 *Amex*, 2011 WL 13073683, at *3. Focusing on the independent authority of a state Attorney General
 15 as compared to the separate authority of the remainder of the executive branch, the *Amex* Court
 16 found that state Attorneys General lacked control over their respective state agencies’ documents
 17 based on the risk of the agencies having a potential “virtual veto” on their state Attorney General:

18 It is not for this court to interfere with the State Attorneys General’s
 19 ability to exercise their state constitutional power to bring an
 20 enforcement lawsuit absent gubernatorial approval. To find that the
 21 State Attorneys General have control over the documents in
 22 possession of state agencies that operate wholly independently of the
 State Attorneys General would be giving the Governors’ Offices and
 state agencies a ‘virtual veto’ over the policy decision to bring an
 enforcement action that rightfully lies with the State Attorneys
 General.”

23 *Id.* The state Attorneys General rely on this “virtual veto” argument in this Multi-District Litigation.

24 Upon further examination, the “virtual veto” argument is speculative as to why and how an
 25 agency’s actions in responding to discovery would rise to the level of the hypothetical “virtual veto”
 26 over litigation. The *Amex* opinion does not adequately explain how treating a non-party agency as
 27 subject to party discovery would, by itself, result in a state Governor’s preventing or obstructing
 28 future lawsuits by its attorney general. *See id.* Indeed, regardless of the non-party agency’s actions,

1 the state Attorney General would still have its own independent authority to initiate and prosecute
2 its own lawsuits – there is no “veto” over that power. *Monsanto*, 2023 WL 4083934, at *3. The
3 *Amex* Court does not discuss why the Governor or agencies would refuse to comply with party
4 discovery, when faced with a court order requiring them to do so. Nor does the *Amex* opinion
5 explain why there would be a “veto” in light of the procedural remedies available to secure
6 production of documents from the hypothetically refusing state agencies; nor does the opinion
7 discuss alternative procedures available to obtain discovery from recalcitrant third parties.

8 More fundamentally, the *Amex* Court’s alleged harm from a “virtual veto” is illusory. Even
9 if state agencies operate independently from their state attorneys general, the *Amex* opinion ignores
10 the role that state attorneys general have as counsel for the state agencies. As discussed below,
11 typically a State’s constitutional or statutory scheme mandates that all state agencies utilize their
12 state Attorney General as legal counsel in litigation (albeit sometimes with allowable exceptions
13 under certain conditions, none of which have been shown to exist or been triggered in this Multi-
14 District Litigation). Under such required representation schemes, the state Attorneys General must
15 still advise, confer, and coordinate with their clients (the respective state agencies) regardless of
16 whether a discovery request is served pursuant to Rule 34 or Rule 45. The “virtual veto” argument
17 assumes without explanation that these agencies would refuse to comply with party discovery under
18 Rule 34, but would at the same time comply with third-party discovery under Rule 45. In other
19 words, the “virtual veto” argument assumes the agencies would reject party discovery with such
20 vehemence that they would risk sanctions, but inexplicably would comply normally in response to
21 subpoenas. While the burdens and procedures between Rule 34 document requests and third-party
22 subpoenas differ in some respects, as a practical matter, when it comes down to the fundamental
23 issue of whether documents will be produced, the same general types of discussions between counsel
24 as to relevance, scope, proportionality, and privilege apply to both. It is not explained why an
25 agency would absolutely refuse to produce documents at all under Rule 34 without good and proper
26 reasons, and yet why the same good and proper reasons would disappear in the face of a subpoena.
27 Further, it is not explained why a Governor or state agency lacks the exact same “virtual veto” if
28 and when it were to obstinately refuse to produce any documents at all in response to a subpoena –

1 the same unfounded fear that an agency would act so extremely uncooperatively is unbounded and
2 (under the plaintiffs' hypothetical) would be just as likely to occur in response to a subpoena.

3 Further, these unsubstantiated fears that agencies would refuse to produce documents, even
4 when coordinating with their own lawyers from their own state Attorney General's office, ignores
5 the close relationship lawyers have with their clients. Indeed, this argument ignores the likely much
6 closer relationship that a state agency would have with lawyers from their state's Attorney General's
7 office, who repeatedly represent their state's agencies in multiple matters throughout the years. This
8 argument also ignores that this refusal to produce documents sought under Rule 34 would persist
9 even after these state Attorneys General perform able legal services and reasonably advise their
10 clients about the obligations to comply with reasonable, proportional discovery under the Federal
11 Rules (and the enforcement mechanisms available when parties refuse to comply at all). Combined
12 with the fact that there is no explanation how a refusal to produce documents would necessarily put
13 the litigation to an end (*i.e.*, veto the litigation), the alleged harm here is based on a hyperbolic,
14 worst-case scenario argument. Therefore, the notion that Governors or state agencies could
15 effectively veto an enforcement action by withholding documents sought under Rule 34 is an
16 unfounded hypothetical and not a strong basis on which to find a lack of control where other factors
17 support such a finding.

18 As discussed, if the state agencies simply refused to provide documents, the *Amex* opinion
19 ignores that they *would* be subject to legal consequences. *Lofton, v. Verizon Wireless (VAW) LLC*,
20 308 F.R.D. 276, 285 (N.D. Cal. 2015) ("The court's inherent authority to sanction includes not only
21 the authority to sanction a party, but also the authority to sanction the conduct of a nonparty who
22 participates in abusive litigation practices, or whose actions or omissions cause the parties to incur
23 additional expenses."). A Court has the inherent authority to enforce its own Orders to control the
24 conduct of the proceedings, protect the "orderly administration of justice," and maintain "the
25 authority and dignity of the court." *Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 764–67 (1980).
26 Should a state agency violate an Order compelling production, this Court would have the inherent
27 authority to issue sanctions (including monetary sanctions) against the state agencies committing
28 any such hypothetical refusal to abide by Court Order. The Ninth Circuit has long recognized that,

1 if non-party agencies refuse to produce documents, ultimately the courts may compel them to do so.
2 *Harvey Aluminum*, 335 F.2d at 754 (“[T]he Departments of Justice and Labor are not sovereign, and
3 though the [National Labor Relations] Board may not be able to compel them to produce documents
4 in their possession, the President *or, if need be, the courts, may do so.*”) (emphasis added).

5 The “virtual veto” argument suffers from a further legal weakness: the argument appears to
6 be based on incorrect views of the legal duties and the role of counsel in the discovery process. As
7 counsel for a party subject to discovery, a state Attorney General has the legal authority and duty to
8 take action to make inquiry and collect the documents from the uncooperative state agencies directly
9 and cannot simply sit on their hands in the face of an uncooperative client. *See, e.g., Rhea v.*
10 *Washington Dep’t. of Corr.*, 2010 WL 5395009, at *6 (W.D. Wash. Dec. 27, 2010) (State Attorney
11 General representing agency: “counsel” “has an obligation to not just request documents of his
12 client, but to search for sources of information. Counsel must communicate with the client, identify
13 all sources of relevant information, and ‘become fully familiar with [the] client’s document retention
14 policies, as well as [the] client’s data retention architecture.’”) (internal citation omitted). “The
15 relevant rules and case law establish that an attorney has a duty and obligation to have knowledge
16 of, supervise, or counsel the client’s discovery search, collection, and production. It is clear to the
17 Court that an attorney cannot abandon his professional and ethical duties imposed by the applicable
18 rules and case law and permit an interested party or person to ‘self-collect’ discovery without any
19 attorney advice, supervision, or knowledge of the process utilized.” *Equal Emp. Opportunity*
20 *Comm’n v. MI 5100 Corp.*, No. 19-CV-81320, 2020 WL 3581372, at *2–3 (S.D. Fla. July 2, 2020)
21 (“Attorneys have a duty to oversee their clients’ collection of information and documents, especially
22 when ESI is involved, during the discovery process. Although clients can certainly be tasked with
23 searching for, collecting, and producing discovery, it must be accomplished under the advice and
24 supervision of counsel, or at least with counsel possessing sufficient knowledge of the process
25 utilized by the client. Parties and clients, who are often lay persons, do not normally have the
26 knowledge and expertise to understand their discovery obligations, to conduct appropriate searches,
27 to collect responsive discovery, and then to fully produce it, especially when dealing with ESI,
28 without counsel’s guiding hand.”).

1 This would not be the first time an attorney was faced with a client who posed difficulties in
2 collecting documents for discovery. *See, e.g., Qualcomm Inc. v. Broadcom Corp.*, No. 05cv1958-
3 B (BLM), 2010 WL 1336937, at *2–5 (S.D. Cal. April 2, 2010). Counsel in a litigation have legal
4 duties to take proactive steps in supervising and searching for documents in discovery that go far
5 beyond simply acceding to a client who fails (or worse, refuses) to produce or provide documents.
6 *Id.* (detailing “Discovery Errors” by counsel); *Rodman v. Safeway Inc.*, No. 11-cv-03003-JST, 2016
7 WL 5791210, at *3–4 (N.D. Cal. Oct. 4, 2016) (awarding discovery sanctions where, among other
8 things, there was “no indication that Safeway’s counsel guided or monitored [client employee] Mr.
9 Guthrie’s search of the legacy drive in any significant way”).

10 Counsel cannot simply advise clients about document requests and leave it up to the client
11 to decide whether or not to risk sanctions for failure to produce – in appropriate circumstances,
12 counsel may need to personally conduct or directly supervise a client’s collection, review, and
13 production of responsive documents. *See Optronic Techs., Inc. v. Ningbo Sunny Elec. Co.*, No. 16-
14 cv-06370-EJD (VKD), 2020 WL 2838806, at *5–7 (N.D. Cal. June 1, 2020) (awarding discovery
15 sanctions: “It is not enough for counsel to provide advice and guidance to a client about how to
16 search for responsive documents, and then not inquire further about whether that advice and
17 guidance were followed The Court does not conclude that counsel must always personally
18 conduct or directly supervise a client’s collection, review, and production of responsive documents.
19 However, in the circumstances presented here, the Court finds that [counsel] Sheppard Mullin did
20 not make a reasonable effort to ensure that [sanctioned party] Ningbo Sunny produced all the
21 documents responsive to Orion’s requests and thus violated its obligations under Rule 26(g)(1)(B) .
22 . . . [T]he Court orders Ningbo Sunny’s new counsel of record to undertake an independent effort
23 to ensure that Ningbo Sunny fully complies with Orion’s post-judgment document requests.”); *see*
24 *also Etopus Tech., Inc. v. Liu*, No. 23-cv-06594-HSG (PHK), 2024 WL 3311053, at *6 (N.D. Cal.
25 July 5, 2024) (ordering production of documents and ordering counsel to provide supplemental
26 response “attesting to the fact that Defendant’s counsel performed the search for documents directly
27 (and did not rely solely on their client), and attesting to whether Defendant’s counsel themselves
28 performed a reasonable, good faith search”).

1 The Court finds as legally erroneous the argument that the state Attorneys General would
2 lack control over state agency materials simply because litigation counsel is either helpless in the
3 face of an uncooperative client or can satisfy their obligations as officers of the Court by merely
4 acquiescing to a client's refusal to collect documents (and presumably allowing a client to face
5 sanctions). *See Kaur v. Alameida*, No. CV F 05 276 OWW DLB, 2007 WL 1449723, at *2 (E.D.
6 Cal. May 15, 2007) (finding defendants have control over agency documents and ordering further
7 search: "defendants *and counsel* are reminded of their duty under Rule 34 to conduct a diligent
8 search and reasonable inquiry in effort to obtain responsive documents") (emphasis added). The
9 "virtual veto" arguments are based on a fundamentally flawed misunderstanding of counsel's role
10 and the available procedures under the Federal Rules for the proper conduct of discovery and the
11 rational administration of justice – counsel have a proactive duty to conduct discovery under the
12 rules without requiring constant judicial intervention. "In complex litigation such as this, cases are
13 shaped, if not won or lost, in the discovery phase. The rules of discovery must necessarily be largely
14 self-enforcing. The integrity of the discovery process rests on the faithfulness of *parties and counsel*
15 to the rules—both the spirit and the letter. '[T]he discovery provisions of the Federal Rules are
16 meant to function without the need for constant judicial intervention and . . . those Rules rely on the
17 honesty and good faith of counsel in dealing with adversaries.' The rules of procedure (and
18 attorneys' duty to adhere to them) apply with equal force to decisions made in private discussions
19 behind closed doors in a client's office on how much effort to expend to answer the opposing party's
20 discovery, as to attorney conduct in the bright light of open court." *Poole ex rel. Elliott v. Textron,*
21 *Inc.*, 192 F.R.D. 494, 507 (D. Md. 2000) (citation omitted) (emphasis added); *see also King v. Habib*
22 *Bank Ltd.*, No. 20-cv-04322-LGS-OTW, Dkt. 272, slip op. at 2 (S.D.N.Y. July 1, 2024)
23 ("embroil[ing this judge] in day-to-day supervision of discovery [is] a result directly contrary to the
24 overall scheme of the federal discovery rules").

25 In addition to supervising the collection of documents and making inquiry of clients to
26 ensure proper collection of documents is undertaken, attorneys representing clients in court
27 proceedings have legal duties under the Federal Rules of Civil Procedure to work cooperatively to
28 improve the administration of civil justice, both as officers of the court and under their ethical

obligations as members of the bar. *See* Fed. R. Civ. P. 1 advisory committee’s note to 2015 amendment; *see also* Fed. R. Civ. P. 26(g) advisory committee’s note to 1983 amendment (“Rule 26(g) imposes an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37. . . . The subdivision provides a deterrent to both excessive discovery and evasion by imposing a certification requirement that *obliges each attorney* to stop and think about the legitimacy of a discovery request, a response thereto, or an objection. The term ‘response’ includes answers to interrogatories and to requests to admit as well as responses to production requests. ***If primary responsibility for conducting discovery is to continue to rest with the litigants, they must be obliged to act responsibly and avoid abuse.***”) (emphasis added)

These duties imposed on counsel are important for the discovery system under the Federal Rules to operate rationally and effectively. As the Ninth Circuit has recognized, “legal duties” are logical antecedent to “legal rights” and thus the state Attorneys’ General legal duties to undertake proactive efforts to collect documents from clients in discovery are the flip side to the legal right to access those documents. *Newman v. Sathyavaglswaran*, 287 F.3d 786, 790 n.5 (9th Cir. 2002) (“The logical relationship between rights and duties has been the subject of considerable academic examination. Wesley Hohfeld famously described rights and duties as ‘jural correlatives’—different aspects of the same legal relation. Oliver Wendell Holmes described rights as ‘intellectual constructs used to describe the consequences of legal obligations. [sic] As he puts it [in *The Common Law* (1881)], ‘legal duties are logically antecedent to legal rights.’”) (internal citations omitted). Here, the recognition that a state Attorney General, presumptively counsel for its state agencies, has legal duties to supervise the collection of (and possibly directly obtain) documents from those agencies for discovery leads logically to the conclusion that the state Attorneys General have the legal right to access those documents. That is, counsel’s legal duty to ensure collection of documents from a client is a different aspect of (and correlates juridically to) a legal right to access those documents, and thus supports the conclusion of control for purposes of discovery.

Finally, as discussed herein, the issue of control is analyzed on a state-by-state basis. Assuming there is a factual record showing an actual, cognizable, and not an unfounded hypothetical

1 risk of a “virtual veto” materializing in a particular State, the Court would consider that factor among
 2 the totality of circumstances to evaluate the control issue.

3 **VI. ATTORNEY-CLIENT RELATIONSHIP AND LEGAL RIGHT TO ACCESS**

4 As noted, many (if not all) of the state Attorneys General have confirmed that they will (or
 5 likely will) represent their respective state agencies. When a state agency is mandated to use the
 6 state attorney general as its exclusive legal counsel, this mandate carries with it an indication that
 7 the attorney general has legal control over the agency’s documents. The close coordination
 8 underlying an attorney-client relationship is a factor in the legal control analysis. “In general, an
 9 attorney is presumed to have control over documents in its client’s possession.” *Perez v. Perry*, No.
 10 SA-11-CV-360-OLG-JES, 2014 WL 1796661, at *2 (W.D. Tex. May 6, 2014).

11 In *Love v. New Jersey Dept. of Corr.*, No. 2:15-CV-4404-SDW-SCM, 2017 WL 3477864,
 12 at *5–6 (D.N.J. Aug. 11, 2017), the Court held that the defendants have control over the documents
 13 of a third-party state agency “albeit through their attorney” where those defendants were defended
 14 by the New Jersey Attorney General, who also represented the third-party agency. *Accord Williams*
 15 *v. Hawn*, No. 1:21-cv-446, 2022 WL 22859198, at *2 (W.D. Mich. Aug. 26, 2022) (finding
 16 defendants have control over third-party agency documents: “Courts have considered the existence
 17 of a principal-agent relationship sufficient to satisfy the ‘possession, custody, or control’
 18 requirement Here, Defendants are represented by the Michigan Attorney General, which has
 19 demonstrated access to [third-party agency] MDOC documents and materials in many cases before
 20 this Court.”).

21 In *Synopsis, Inc. v. Ricoh Co.*, No. C-03-2289 MJJ (EMC), 2006 WL 1867529 (N.D. Cal.
 22 July 5, 2006), the defendants sought an order compelling Ricoh to search for and produce documents
 23 from a third party, KBSC. The Court ordered that search for documents where it was “especially
 24 telling” that common counsel was involved:

25 In making this order, the Court finds that Ricoh has sufficient control
 26 over KBSC for purposes of Rule 34 for the Court to order counsel for
 27 Ricoh to search the storage facility Although the Court
 28 acknowledges that voluntary cooperation between a party and a third
 party does not automatically establish control, the facts here suggest
 that there is more than just voluntary cooperation. It is especially
 telling that KBSC agreed to be represented by Ricoh’s counsel for

purposes of discovery and, more important, that Ricoh was able to secure a search of the storage facility by Mr. Bershader and a declaration from the same within only three days of the parties' meet and confer."

Id. at *2. Under *Synopsys*, then, the fact that the party and third party are represented by the same counsel is "especially telling" and thus a relevant factor in finding legal control. The Court is cognizant that *Synopsys* cites out-of-circuit case law which refers to the "practical ability" factor rejected by the Ninth Circuit in *Citric Acid*. *Id.* (citing *Bank of New York v. Meridien BIAO Bank Tanzania Ltd.*, 171 F.R.D. 135, 146 (S.D.N.Y. 1997)). However, in *In re NCAA Student-Athlete Name & Likeness Litig.*, No. 09-cv-01967 CW (NC), 2012 WL 161240, at *4 (N.D. Cal. Jan. 17, 2012), the Court undertook a "close look at the facts of those two cases" and explained that at least in part their holdings did not fundamentally rely on the "practical ability" test. The Court held that, even if the Court were to apply the rejected "practical ability" test, under the facts of the case the moving party failed to support a finding of "practical ability." *Id.*

In the state governance context, a legal relationship between the state Attorney General and the agency establishes a direct legal link between the agency and the plaintiff (either directly where the Attorney General is a named plaintiff, or through counsel), thus supporting a finding of control. *See Bd. of Educ. of Shelby Cnty., Tenn.*, 2012 WL 6003540, at *3 ("Based upon these statutory duties to handle 'all legal services,' 'direct and supervise' all litigation, and 'represent' the State of Tennessee, one such responsibility must be to respond appropriately to discovery requests on behalf of the entities of the state government that he represents as required by the Federal Rules of Civil Procedure."). As the designated legal representative for a state agency, the Attorney General has professional and ethical obligations to access to all relevant documents to provide effective legal counsel and representation. This access is *legally mandated* (and goes beyond a mere practicality), ensuring that the Attorney General can fulfill their duties under the Federal Rules.

If a state agency's use of the state Attorney General as legal counsel is not mandatory but relies on consent of the state agency, the analysis of legal control over the agency's documents may rely on other factors such as whether, in a given case, the state agency has already committed in fact to be so represented, or if there are no conditions for the state agency to avoid relying on the free legal services of the state attorney general. While a state agency may be granted by statute some

potential or theoretical ability to choose legal representation, often that ability is subject to the discretion of the state Attorney General or subject to some other restriction (such as a conflict of interest). Further, at hearings in this Multi-District Litigation which involves some states where the state agency may have some ability to be represented by counsel other than the state Attorney General, this Court has inquired of and suggested to the State Attorneys General that they discuss this litigation and confirm whether or not the agencies at issue will rely on their local state Attorney General. *See* Dkt. 818. The Court notes that, to date, no separate counsel has entered appearances for any of the state agencies at issue, and the state Attorneys General previously indicated that they have either chosen not to or (at minimum) simply failed to confer with their state agencies, even as a courtesy. However, a number of State Attorneys General have voluntarily sent litigation hold notices to their respective identified agencies, and pursuant to this Court's Order, the State Attorneys General who did not voluntarily do so have sent litigation hold notices to their respective agencies. [Dkt. 1025]. Despite having notice of this litigation and the fact that they may be the subject of discovery, none of the state agencies at issue have moved to intervene to advance their own alleged interests in not being subject to party discovery. And no state agencies (where they would have the ability to do so under state law) have indicated that they retained private or separate counsel (such as agency counsel) to represent their interests without the benefit of otherwise free legal representation from their State Attorney General. Thus, the current record submitted to this Court for decision indicates that no state agencies have confirmed they will retain separate counsel (as none has entered appearance), and the Court analyzes the issues for the states below with the factual record as the State Attorneys General have chosen to submit.

VII. A PARTY TO THE SUIT IS BOTH A LEGAL SERVICES PROVIDER WHILE ALSO COUNSEL TO BOTH ITSELF AS A PARTY AND COUNSEL TO THE THIRD PARTY

As discussed, in nineteen of the state lawsuits here, the state Attorney General is a named party to the suit as relator. Further, in another three lawsuits, the state Attorney General is the sole named plaintiff. *See* Multistate Complaint (naming Attorneys General of Maryland and New Jersey); *see also Office of the Attorney General, State of Florida, Department of Legal Affairs v. Meta Platforms, Inc.*, No. 23-cv-05885, at Dkt.1 (N.D. Cal. Oct. 24, 2023) (Florida complaint

1 naming “Office of the Attorney General, State of Florida” as Plaintiff). Thus, in twenty-two of the
2 cases in this Multi-District Litigation the Party nominally subject to party discovery as plaintiff is
3 the state Attorney General itself. In the remaining thirteen state Plaintiff cases in this Multi-District
4 Litigation, the plaintiff state is represented by the state Attorney General as counsel.

5 As discussed in the state-by-state analysis below, for many (if not most) of the states the
6 Attorney General is obligated by local law to represent the state agencies at issue in this matter.
7 Indeed, several of the state Attorneys General have indicated to the Court that they will in fact
8 represent their state agencies at issue for purposes of discovery in this case. *See* Dkt. 738-1. For
9 the remainder, the state Attorney General may have some element of statutory discretion not to
10 necessarily represent the state agencies under certain conditions (such as a conflict of interest) – but
11 no such conditions have been presented to the Court by any of the state Attorneys General.
12 Accordingly, the upshot is that, on the current record before the Court, it appears that all (or virtually
13 all) of the state Attorneys General will represent both the named plaintiff and the state agencies at
14 issue for purposes of discovery in this case.

15 The Court recognizes that this is a somewhat unusual situation, in which a law enforcement
16 organization (the Attorney General) is both a party to the case while also acting or able to act as
17 counsel for a third party. However, law firms and legal services providers are themselves parties to
18 litigation sometimes. And this case would not be the first time that a legal services provider, as a
19 party, is found to have control over third party documents for purposes of discovery. *See, e.g.,*
20 *Becnel v. Salas*, No. MC 17-17965, 2018 WL 691649, at *4 (E.D. La. Feb. 2, 2018) (“Both Salas
21 individually and his law firm, the subpoena recipients and defendants in this court, are counsel of
22 record for the Salas defendants in the Florida lawsuit Thus, a Rule 34 request for production
23 to Salas in the Florida lawsuit required Salas to respond as to responsive materials over which Salas
24 and his law firm had possession, custody or control.”).

25 Indeed, one court has noted that “[i]n general, an attorney is presumed to have control over
26 documents in its client’s possession.” *Perez*, 2014 WL 1796661, at *2. Thus, to the extent a state
27 Attorney General represents a state agency for discovery, that state Attorney General would be
28 presumed to have control over the documents in its client’s possession.

Precedent explains why courts have found a legal services provider, particularly a state Attorney General, representing both a party and a third party (particularly a state agency) to be properly found to have control of the third party's documents for discovery. First, again as discussed above, control in this context does not mean "operational" or "managerial" control – these precedents are not deciding that a law firm directs the day-to-day operations of their client, and arguments by several of the state Attorneys General that they do not control the state agencies in this "operational" or "executive" sense are not on point. Second, in a reflection that control should be grounded in reality, courts find control in situations involving government attorneys representing both a party and a third-party agency based on their real-world experiences and the facts as a whole. *Int'l Union of Petroleum & Indus. Workers*, 870 F.2d at 1453 ("[c]ontrol must be firmly placed in reality.").

Multiple courts have found that a party (such as a government employee or official) has control over documents of a state agency based in part on the fact that the governmental party was represented by and/or employed by the state Attorney General:

If Defendants seek to avoid production by contending that they are not in possession, custody or control of the requested documents, their objection is denied. The specific facts of this action render such an objection unfounded. By virtue of their employment with non-party CDCR [California Department of Corrections and Rehabilitation], individual defendants are represented by the Attorney General's Office. It is this Court's experience that either individual defendants who are employed by CDCR and/ or the Attorney General can generally obtain documents, such as the ones at issue here, from CDCR by requesting them. They have constructive control over the requested documents, and the documents must be produced.

Pulliam v. Lozano, No. 1:07-CV-964-LJO-MJS, 2011 WL 335866, at *1 (E.D. Cal. Jan. 31, 2011); *see also Quiroga v. Green*, No. 1:11CV00989 AWI DLB, 2013 WL 6086668, at *2 (E.D. Cal. Nov. 19, 2013) (affirming Magistrate Judge order finding defendant has control over third-party agency documents: "it is this Court's experience that either individual defendants who are employed by CDCR, and/or the Attorney General who represents them, can generally obtain documents from CDCR by requesting them. If this is the case, then, based on their relationship with CDCR, they have constructive control over the requested documents and the documents must be produced."); *accord Mitchell v. Adams*, No. CIVS062321GEBGGHP, 2009 WL 674348, at *9, 11–13, 17 (E.D.

1 Cal. Mar. 6, 2009) (rejecting multiple objections regarding alleged lack of control of agency
2 documents where common counsel represented a party and the agency). To the extent these
3 precedent involve a government official as the party found to have control over agency documents,
4 these precedents are even more germane to the twenty-four cases here where the state Attorney
5 General themselves are the specifically named plaintiff or co-plaintiff.

6 Similarly, in *Zackery*, the Court overruled the objection that the named individual defendants
7 lacked control over the documents of a third-party agency. *Zackery v. Stockton Police Dep't.*, No.
8 CIVS-05-2315MCEDADP, 2007 WL 1655634, at *4 (E.D. Cal. June 7, 2007). The *Zackery* Court
9 ordered that discovery be provided to the plaintiff directly by the government counsel involved (who
10 both represented the named defendants and the agency): “the court will direct **counsel for**
11 **defendants** [Office of the City Attorney] to make the necessary inquiries and arrangements for the
12 requested citizen complaint records to be produced to plaintiff.” *Id.* (emphasis added).

13 These cases are illustrative of factual situations involving the same prosecuting attorneys
14 (such as a state Attorney General) representing both a named party and the third party agency, and
15 demonstrate that courts conclude there is control such that the agency documents were subject to
16 party discovery. This factor of “common counsel” and its impact on a finding of control extends
17 beyond the governmental entity context, thus demonstrating that this factor is recognized and
18 applied by courts in a broader context. *See, e.g., Almont Ambulatory Surgery Center, LLC*, 2018
19 WL 1157752, at *19 (finding control where, among “[o]ther factors that courts consider to
20 ‘determine when documents in the possession of one corporation may be deemed under control of
21 another corporation,’ . . . Additional factors include: employing the same attorneys”) (citations
22 omitted); *see also M.L.C., Inc. v. N. Am. Philips Corp.*, 109 F.R.D. 134, 139 (S.D.N.Y. 1986)
23 (finding control where “[i]n fact, it appears that Mr. Hainline [(counsel for the third parties)] and
24 defendants’ present counsel have a working relationship.”).

25 To be clear, the Court is not relying on these precedents to demonstrate the practical ability
26 of the state Attorney General to obtain documents from the state agencies. Rather these precedents
27 demonstrate that, under the totality of circumstances, control can be found where the decision is
28 firmly placed in reality. These precedents also demonstrate that the hypothetical fear of agency

1 refusals to cooperate with party discovery has not materialized.

2 Finally, the Court is not holding broadly that the law requires finding a legal right of access
3 to and thus control over third party client documents in every case involving a legal services provider
4 as a party. However, this factor is one of the totality of factors which impact the control inquiry and
5 here, because the state Attorneys General are either parties themselves or at least are counsel for a
6 party, and because the state Attorneys General will represent the state agencies for discovery, this
7 factor takes on particular significance.

8 **VIII. STATUTORY RESTRICTIONS ON A STATE ATTORNEY GENERAL FROM**
9 **ACCESSING DOCUMENTS FROM THE STATE'S AGENCIES**

10 Several state Attorneys General have argued that local statutes place limitations on their
11 ability to access documents from a state agency. These are discussed in detail in the state-by-state
12 analysis below. As a preliminary matter, not all of these statutes actually place limits on the state
13 Attorneys General as argued. Some are limited to only a specific subset of agencies (some of which
14 are not even relevant to this matter). And detailed analysis shows that some actually provide a
15 mechanism and a right to access agency documents, not prohibit access.

16 As a variation of this argument, some of the state Attorneys General argue that public
17 channels or public information requests are required for the state Attorney General to obtain
18 documents from state agencies. This argument is based on an interpretation of the various “open
19 records” statutes which the Court finds legally erroneous. None of the cited “public records” statutes
20 state that they are the exclusive method by which a state Attorney General can access documents
21 from state agencies. Further, the state Attorneys General argue perhaps too much in this regard – if
22 their arguments are taken literally, then these “open records” statutes would constitute a legal right
23 to access the agencies’ documents on the part of the corresponding state Attorney General. By
24 definition, an “open records” statute provides a mechanism by which a state Attorney General can
25 literally obtain requested documents upon demand from an agency. If the state Attorneys General
26 were correct that, every time a lawyer of the state Attorney General seeks documents from state
27 agencies, a public records law requests would be routine and necessary, then the logical conclusion
28 is that the public records law would be a routinely used legal right to access those documents and

1 records of the agency subject to the Act. At least one court has found that a state “public records”
2 Freedom of Information Act constitutes a legal right to access documents from an agency for
3 purposes of “control” under Rule 34. *See Flagg v. City of Detroit*, 252 F.R.D. 346, 355–57 (E.D.
4 Mich. 2008) (“Because at least some of the text messages maintained by [(third party)] SkyTel are
5 ‘public records’ within the meaning of Michigan’s FOIA, it would be problematic, to say the least,
6 to conclude that the [named defendant] City lacks a legal right to obtain these records as necessary
7 to discharge its statutory duty of disclosure.”). However, the Court finds that the arguments based
8 on these “open records” statutes to be incorrect, in any event.

9 The “open records” arguments are particularly weak in the situation where a state Attorney
10 General is required to act as counsel for the state agencies by local mandate. If this interpretation
11 of the “open records” statutes were correct, then the state Attorneys General would have to submit
12 an “open record” request or “public information” request even when representing a state agency, to
13 get documents from its own client. In fact, under the argument presented, any lawyer representing
14 any state agency (whether the state Attorney General or private counsel) would be forced to use an
15 “open records” request to obtain documents from their own client. Such an interpretation is
16 nonsensical and impractical, as well as contrary to the principles of effective legal representation.
17 As counsel, a state Attorney General will have the normal type of direct access to the necessary
18 documents from its own clients, ensuring efficient and comprehensive legal support for the agencies
19 involved. The Attorneys General’s role as legal counsel for state agencies (with concomitant ethical
20 and professional obligations) directly contradicts the argument that they would be entirely restricted
21 from accessing their clients’ documents. In their capacity as counsel, Attorneys General are often
22 responsible for representing the interests of state agencies, which would include responding to
23 subpoenas and managing legal matters on their behalf. This representative role inherently requires
24 a level of access to agency documents necessary to fulfill their duties effectively. The state
25 Attorneys General cite no precedent requiring any attorneys representing a state agency to use either
26 an “open records” request or a subpoena to obtain documents from their own clients. The cited
27 “public records” or “open information” statutes are not shown to be actual impediments to normal
28 attorney-client access to documents, because those statutes apply to records which are to be

1 produced for public inspection (and not for purposes of litigation such as this Multi-District
2 Litigation), particularly where there is a Protective Order limiting public availability of confidential
3 documents.

4 While other statutes discussed below may be factors in the legal control analysis, such
5 statutes are only one among the totality of factors for deciding control and the discussion above
6 regarding the impact (or lack thereof) of state statutes on this issue is of equal force.

7 **IX. THIRD PARTY INVOLVEMENT IN THE LITIGATION AND WHETHER THE**
8 **THIRD PARTY STANDS TO BENEFIT FROM THE LITIGATION**

9 In the context of corporate disputes, courts have found legal control when a party and non-
10 party have similar financial interests. In *Hitachi*, Defendant AmTRAN argued that Plaintiff and
11 patent owner Hitachi had legal control over documents from Hitachi's patent licensing agent Inpro
12 II Licensing Sarl (Inpro), and accordingly that Hitachi should obtain and produce documents from
13 Inpro in response to AmTRAN's Rule 34 document requests. *Hitachi*, 2006 WL 1038248, at *1.
14 The *Hitachi* opinion noted that "a subsidiary will be required to produce documents wholly owned
15 by the parent company. The third party's financial interest in the litigation might further require its
16 cooperation in the discovery process." *Id.* (citations omitted).

17 In the context of state governance, this principle applies where state Attorneys General and
18 the state agencies would benefit from a damage award resulting from the litigation brought by the
19 state Attorney General. Just as courts have found legal control in corporate settings when a party
20 and non-party have similar financial interests, a similar rationale applies to state entities. *Id.* If a
21 state agency stands to gain financially from the litigation outcome, its interests align closely with
22 those of the Attorney General. *Cf. Japan Halon*, 155 F.R.D. at 628–29 ("This court does not agree
23 that because neither parent corporation owns a majority of the shares, neither will benefit. The court
24 is also not convinced that because any award would go to Japan Halon, its parent corporations would
25 not benefit directly enough to warrant any production of documents on their behalf."). When
26 litigation proceeds directly support or fund a state agency, it is reasonable to expect full cooperation
27 in the discovery process. This cooperation ensures the availability of relevant documents, enhancing
28 the attorney general's enforcement actions and promoting justice. Here, all the States have expressly

1 stated that “[t]his action is in the public interest of the Filing States” and thus have made clear they
 2 have a substantial stake in the outcome of this action going even beyond financial interests. *See*
 3 Multistate Complaint at ¶ 12.

4 **X. OTHER RELEVANT FACTORS**

5 As discussed above, the Ninth Circuit rejected the “practical ability” as the test for legal
 6 control in *Citric Acid*. *See Genentech, Inc. v. Trustees of Univ. of Pennsylvania*, No. C 10-2037
 7 PSG, 2011 WL 5373759, at *2 (N.D. Cal. Nov. 7, 2011) (distinguishing *Hitachi*’s citation to
 8 “practical ability” case law); *see also In re NCAA Student-Athlete Name & Likeness Litig.*, 2012
 9 WL 161240, at *4. The Court notes that one district court in this Circuit has carefully analyzed
 10 *Citric Acid* and found that the Ninth Circuit cited favorably therein to a Third Circuit opinion which
 11 holds that “practical ability” is a factor for the “legal control” test. *AFL Telecomms. LLC v.*
 12 *SurplusEQ.com Inc.*, No. CV11-1086 PHX DGC, 2012 WL 2590557, at *2 (D. Az. July 5, 2012)
 13 (citing *Gerling Int’l Ins. Co. v. Comm’r*, 839 F.2d 131, 140–41 (3rd Cir. 1988)). Precedents in this
 14 district have, however, distinguished *AFL Telecommunications*. *See Seifi v. Mercedes-Benz U.S.A.,*
 15 *LLC*, No. 12-CV-05493TEH (JSC), 2014 WL 7187111, at *2 (N.D. Cal. Dec. 16, 2014); *cf. also*
 16 *Dugan v. Lloyds TSB Bank, PLC*, No. 12CV02549WHANJV, 2013 WL 4758055, at *2 (N.D. Cal.
 17 Sept. 4, 2013).

18 As noted, the issue in *Citric Acid* arose in the context of a motion to enforce a subpoena
 19 directed to a third party, in which the moving party was seeking discovery from a fourth party via
 20 that third party. *Citric Acid*, 191 F.3d at 1106–07. That is, in *Citric Acid* the subpoenaed third party
 21 was alleged to control a further uninvolved fourth party. *Id.*

22 District court opinions have noted that *Citric Acid* dealt with a subpoena, and those opinions
 23 have assumed that the standard and scope of “legal control” for purposes of a subpoena is the same
 24 as the standard for evaluating the scope of “legal control” for purposes of a document request to a
 25 party under Fed. R. Civ. P. 34. *See, e.g., Soto*, 162 F.R.D. 603; *Hitachi*, 2006 WL 2038248; *In re*
 26 *Legato Sys., Inc. Sec. Litig.*, 204 F.R.D. 167; *Perez*, 2011 WL 1362086; *Miniace*, 2006 WL 335389.
 27 However, it appears that no Ninth Circuit case has specifically addressed whether the scope and
 28 standard for evaluating “legal control” under Rule 34 is the same with regard to a subpoena under

1 Rule 45 (which was at issue in *Citric Acid*). As noted, other Circuits have expressly held that
2 “practical ability” is a factor for the legal control test in the context of document requests under Rule
3 34. *Gerling Int’l Ins. Co.*, 839 F.2d at 140–41.

4 As the Ninth Circuit has stated, “[w]e begin with the principle that the district court is
5 charged with effectuating the speedy and orderly administration of justice. There is universal
6 acceptance in the federal courts that, in carrying out this mandate, a district court has the authority
7 to enter pretrial case management and discovery orders designed to ensure that the relevant issues
8 to be tried are identified, that the parties have an opportunity to engage in appropriate discovery and
9 that the parties are adequately and timely prepared so that the trial can proceed efficiently and
10 intelligibly.” *United States v. W.R. Grace*, 526 F.2d 499, 508–09 (9th Cir. 2008). Further, district
11 courts have wide discretion in controlling and managing the discovery process. *Little v. City of*
12 *Seattle*, 863 F.2d 681, 685 (9th Cir. 1988). Indeed, “Rule 26 vests the trial judge with broad
13 discretion to tailor discovery narrowly and to dictate the sequence of discovery.” *Crawford-El v.*
14 *Britton*, 523 U.S. 574, 598 (1998). As examples, “upon motion[,] the court may limit the time,
15 place, and manner of discovery, or even bar discovery altogether on certain subjects, as required ‘to
16 protect a party or person from annoyance, embarrassment, oppression, or undue burden or
17 expense.’” *Id.* (quoting Fed. R. Civ. P. 26(c)). “And[,] the court may also set the timing and
18 sequence of discovery.” *Crawford-El*, 523 U.S. at 598.

19 Here, the complexity of the multidistrict litigation creates a compounding impact on
20 streamlining discovery. Courts should also consider the goals of efficiency, preservation of judicial
21 resources, preservation of party resources, and simplification of an already complex discovery
22 landscape. Courts should consider the manner and process for pretrial discovery in order to reduce
23 the expense, number of disparate disputes, and procedural complexity. Document requests directed
24 to one party are, in this Court’s experience, typically more efficient and streamlined than multiple
25 separate subpoenas each directed to non-parties.

26 In the context of a state in which the statutory scheme mandates the Attorney General to
27 represent a state agency in litigation, a state Attorney General *will* represent those state agencies in
28 responding to the discovery here, regardless of whether the documents are sought by Rule 34

1 requests for production or by Rule 45 subpoenas. It would be wasteful to require a party in a
 2 complex litigation to serve individual subpoenas on a multitude of state agencies, particularly where
 3 all parties and this Court know that the Attorneys General *will be* representing those state agencies
 4 in responding to the subpoenas. It is not firmly grounded in reality, and thus elevates form over
 5 substance, to ignore that, at the end of the day, many if not all of the parties will be litigating and
 6 negotiating for the documents sought with the very same legal services providers.

7 Several state Attorneys General have argued that, for analytical purposes, the Court should
 8 subdivide their offices between the team or division of attorneys litigating this Multi-District
 9 Litigation versus other sections or divisions of that particular state Attorney General, in order to
 10 argue that there should not be any consequences flowing from the state Attorneys General
 11 representing both the plaintiff and the state agencies. Such argument is not supported by citation to
 12 law and is contrary to the weight of law. The scope of an attorney-client relationship (and the duties
 13 flowing therefrom) encompasses the entirety of a legal services organization due to well-known
 14 rules of imputation of confidences to a legal services organization, including a public law office:

15 When an attorney associates with a law firm, the principle of loyalty
 16 to the client extends beyond the individual attorney and applies with
 17 equal force to the other attorneys practicing in the firm. This principle,
 18 known as the “rule of imputed disqualification,” . . . requires
 19 disqualification of all members of a law firm when any one of them
 practicing alone would be disqualified because of a conflict of interest
 The rule of imputed disqualification applies to both private firms
 and public law firms such as a district attorney’s office or the office
 of the state public defender.

20 *People ex rel. Peters v. Dist. Ct. In & For Cnty. of Arapahoe*, 951 P.2d 926, 930 (Colo. 1998);
 21 *accord City of Cnty. of Denver v. Cnty. Ct. of City & Cnty. of Denver*, 37 P.3d 453, 457 (Colo. App.
 22 2001); *see also Kirk v. First Am. Title Ins. Co.*, 108 Cal. Rptr. 3d 620, 637–38, 642 (Cal. Ct. App.
 23 2010), *as modified* (May 6, 2010) (recognizing rebuttable presumption of imputed knowledge in the
 24 context of government attorneys). Some jurisdictions treat public legal service organizations like
 25 private law firms in the context of the scope of the attorney-client relationship. Even in jurisdictions
 26 which do not automatically impute shared confidences from an attorney-client relationship to an
 27 entire public law office, those courts recognize that ethical screening or other procedures are
 28 required. At a general level, the law does not support the blanket argument that different individual

1 lawyers in the Attorney General’s office have separate, discrete attorney-client relationships with
2 their clients.

3 In this multidistrict litigation, this Court has convened monthly Discovery Management
4 Conferences in order to provide regular and detailed guidance on the complex discovery process
5 and discovery disputes. As fact discovery has progressed, the Court has been presented with
6 numerous discovery motions necessitating separate, hours-long hearings on such disputes.
7 Managing and controlling state agency discovery as set forth herein is, in one way, intended to help
8 facilitate management of the overall discovery process in this multidistrict litigation. Resolution of
9 this “control” issue is directly related to proper and rational management of discovery.

10 This is not merely a hypothetical concern about managing discovery. If the state Attorneys
11 General were correct as to the absolute lack of control of any of the agencies at issue, then Meta
12 would be required to issue over 250 individual subpoenas, and then negotiate the scope of each
13 subpoena after receiving written responses and objections to each. The state agencies and their
14 counsel would be required to correspondingly respond and object to all of these subpoenas and
15 negotiate them with Meta. As a result, there would be the potential for these parties to present over
16 200 allegedly separate disputes over these subpoenas to this Court, with the potential for raising
17 inconsistent or contradictory arguments. This is not merely a hypothetical concern. The Fourth
18 Circuit was confronted with precisely this situation. *In re S.C. Dep’t of Parks, Recreation &*
19 *Tourism*, 103 F.4th 287, 289 (4th Cir. 2024). In that case, a group of multiple States sued Google
20 for alleged antitrust violations, among them South Carolina. *Id.* Google then served party
21 discovery, including document requests on the State Attorneys General who objected to the
22 discovery requests to the extent they sought state agency documents, and the Attorneys General
23 argued (as here) that Google should serve subpoenas on the state agencies. *Id.* Indeed, the State
24 Attorneys General (including South Carolina) wrote that “Google issued Federal Rule 45 subpoenas
25 to numerous state agencies, and State Plaintiffs believe that these subpoenas are the proper channels
26 for Google to seek documents that are in the possession, custody, or control of those agencies.” *Id.*
27 Instead of litigating the “control” issue in that case, Google opted instead to voluntarily serve
28 subpoenas on the state agencies. *Id.* Despite the statements by the South Carolina Attorney General

about the propriety of the subpoena process, the South Carolina Department of Parks, Recreation and Tourism (“SCPRT”) disagreed with the statements of the South Carolina Attorney General and moved to quash Google’s subpoena entirely based on Eleventh Amendment immunity arguments. *Id.* at 289–90. In arguments highly reminiscent of the arguments about “control” asserted in this action, “[a]ccording to SCPRT, because the attorney general ‘does not represent SCPRT or have custody, possession, or control over its records,’ and because he ‘did not bring his claims against Google in a sovereign capacity,’ his joining the State to the litigation against Google could not have waived the Eleventh Amendment immunity of SCPRT, which is a ‘statutorily and constitutionally separate’ state agency.” *Id.* at 291. The district court denied SCPRT’s motion to quash. On appeal, the Fourth Circuit affirmed and rejected South Carolina’s arguments which emphasized the “separateness” of the agency from the State and emphasized the argument that the Attorney General “does not represent” the agency and does not “have custody or control of its records.” *Id.* at 293. While *In re South Carolina Department of Parks, Recreation & Tourism* ultimately dealt with waiver of Eleventh Amendment immunity by a state Attorney General extending to all agencies of the state, the teachings for the analogous situation here is self-evident: requiring a party (like Google in that case, or Meta here) to serve subpoenas on different state agencies who could then assert different (even contradictory) arguments against the subpoenas, where there is a demonstrable and legal basis for finding control, is not conducive to the just and efficient administration of justice.

To the extent the Court find “control” under Rule 34 standards and finds some state agencies are subject to party discovery, their documents would be sought by document requests directed just to one party in each state. While there are real-world implications for management of discovery that flow from the Court’s resolution of this control issue, to be clear the Court has analyzed the issues under appropriate legal standards discussed herein, but also cognizant of the broad discretion the Court exercises in ordering the sequence and management of discovery consistent with the Federal Rules.

Accordingly, the Court exercises its authority in finding the conclusions as to control for each state below pursuant to appropriate legal standards and under the totality of circumstances, firmly grounding its decision in reality and underpinned by the Court’s full discretion.

DISCUSSION

As an initial matter, the Court notes that this discovery dispute solely concerns whether the State Attorneys General's offices have legally sufficient control such that, in responding to Meta's discovery requests, the state agencies' documents should be obtained and produced by the State Attorneys General in response to Fed. R. Civ. P. 34 document requests. For the purposes of this dispute, the Parties do not dispute that the State Attorneys General lack possession or custody of the documents from the state agencies – the only issue presented is the issue of control. Indeed, the law would be clear that the State Attorneys General would have the obligation to respond to the discovery requests if they did have possession or custody of the documents. To the extent the Parties frame their arguments or this dispute as to whether the agencies should be treated as “parties” for this multidistrict litigation such arguments are, at best, imprecise. Whether a party needs to or is requested to be joined as a named party to this case under Fed. R. Civ. P. 19 or 20 are issues, of course, beyond the scope of the discovery referral order in this action.

Thus, the issue at hand is the specific question: whether the State Attorneys General have legal control, for the purposes of discovery, over their respective state agencies under relevant legal standards. It is self-evident from the length of this opinion that state Attorneys General and Meta raised complex questions in the context of the factors used to determine control under the “legal control” test. In light of (and incorporating by reference) this discussion of the legal standards, the Court next analyzes the control issue on a state-by-state basis. The Court approaches that state-by-state analysis following the directive that, fundamentally, “[c]ontrol must be firmly placed in reality.” *Int'l Union of Petroleum & Indus. Workers*, 870 F.2d at 1453.

I. ARIZONA

In opposition to the control issue, the Arizona Attorney General argues primarily the following factors: (1) Arizona agencies may respond without the Arizona Attorney General's assistance; (2) the Arizona Attorney General's powers arise from statute and are thus not plenary; and (3) the Arizona Attorney General is a separate entity and independent from the Arizona agencies. [Dkt. 738-2 at 2]

In support of a finding of control with regard to these state agencies' documents, Meta argues

1 based primarily on the following factors: (1) the Arizona Attorney General is the chief legal advisor
 2 for the State; and (2) certain Arizona agencies are proscriptively barred from obtaining counsel other
 3 than the Arizona Attorney General. *Id.* at 3. Here, Meta seeks discovery from the following Arizona
 4 Agencies: Board of Regents, Commerce Authority, Department of Child Safety; Department of
 5 Education; Department of Health Services; Governor’s Office; Governor’s Office of Strategic
 6 Planning and Budgeting; Office of Economic Opportunity; and State Board of Education. *Id.* All
 7 but three of these state agencies are prohibited from employing legal counsel (or making
 8 expenditures for legal services) outside the Arizona Attorney General’s office. Ariz. Rev. Stat. §§
 9 41-192(A), -192(D).

10 After considering the Parties’ briefs, oral argument and other material submitted, and
 11 applying appropriate legal standards discussed herein, the Court finds that the factors weigh in favor
 12 of a finding that the Arizona Attorney General does have legal control, for purposes of discovery,
 13 over most of the Arizona agencies at issue. While the Arizona Attorney General asserts that Arizona
 14 agencies might respond without its assistance and that the Arizona Attorney General’s powers arise
 15 from (and thus are somehow limited by) statute, these arguments do not negate the fact that the
 16 Attorney General is the chief legal advisor for the state government. Ariz. Rev. Stat. § 41-192(A).
 17 The statutory scheme in Arizona requires that “[t]he attorney general **shall**: 1. Be the legal advisor
 18 of the departments of this state and render such legal services as the departments require [A]nd
 19 coordinate the legal services required by other departments of this state or other state agencies.”
 20 Ariz. Rev. Stat. § 41-192(A)(1)–(3) (emphasis added).

21 Importantly, the Arizona Attorney General’s arguments do not negate the fact that all but
 22 three of the Arizona agencies at issue here are barred by Arizona law from obtaining counsel other
 23 than the Attorney General. Ariz. Rev. Stat. § 41-192(D). Indeed, the Arizona Attorney General
 24 previously confirmed that its office would definitely represent at least four of the Arizona agencies
 25 at issue if Meta were to serve those agencies with a subpoena in this matter. [Dkt. 738-1 at 3–4].
 26 And in their more recent brief, the Arizona Attorney General conceded that they will represent five
 27 state agencies at issue. Dkt. 738-2 at 2 (referring “to the five [agencies] that the [Arizona Attorney
 28 General] currently will, at the request of the agency, represent”). The Arizona statute is clear on its

face that six of the agencies at issue are prohibited completely from retaining separate counsel. *See* Ariz. Rev. Stat. § 41-192(D). While the Arizona Attorney General indicated to the Court that the Attorney General would not represent the Arizona Department of Education and the Arizona Governor's Office of Strategic Planning and Budgeting, that is an error of law because neither of these agencies are exempt from the express statutory prohibition on retaining different counsel. *See* Ariz. Rev. Stat. § 41-192(D). And to be clear, despite its name, the Arizona Governor's Office of Strategic Planning and Budgeting is an agency outside the Arizona Governor's office, has duties to advise both the Governor and Legislature, and is statutorily situated within the Act defining the Arizona Department of Administration. *See* Ariz. Rev. Stat. at §§ 41-701, -722 to -723. Further, as noted above, the Arizona Attorney General has apparently not conferred with these agencies and no other counsel has entered appearance to date for these agencies. Because the Arizona statute is clear on its face that six agencies are barred from retaining separate counsel, *see* Ariz. Rev. Stat. § 41-192(D), the Court finds, based on the current record, that the Arizona Attorney General will serve as counsel in this matter for six agencies (Department of Child Safety; Department of Education; Department of Health Services; Governor's Office of Strategic Planning and Budgeting; Office of Economic Opportunity; and State Board of Education).

As to the three other state agencies (the Commerce Authority, Board of Regents, and Governor's office), the Arizona statutory scheme allows those other agencies to retain separate counsel apart from the state Attorney General. *see* Ariz. Rev. Stat. §§ 41-192(D)(4), (7), and (10). The Arizona Attorney General has represented to the Court that these three agencies will not be represented by the Attorney General for purposes of discovery in this matter, should subpoenas be served on these three agencies. [Dkt. 738-1 at 3–4].

Accordingly, it appears that under the statutory scheme six agencies will be represented by the Arizona Attorney General in this matter for discovery. *See* Ariz. Rev. Stat. §§ 41-192(A), -192(D). Thus, because the Arizona Attorney General will be involved in representing these state agencies in any event in this case, whether to respond to subpoenas or to respond to party discovery, the Court in its discretion determines that a finding of control as to these six agencies is further supported by the simple and pragmatic realities involved in these circumstances.

Further, the Court notes that the State Attorneys General have filed an Administrative Motion to file supplemental information that Meta has recently served an intent to issue subpoenas to various state agencies, including the Arizona Department of Child Safety, the Arizona Department of Education, and the Arizona Department of Health Services. [Dkt. 1031-5 at 734–859]. None of these state agencies are allowed to employ legal counsel other than the Arizona Attorney General and thus by statute each must be represented by the Arizona Attorney General in this matter for discovery. *See* Ariz. Rev. Stat. §§ 41-192(D) (“no state agency other than the attorney general shall employ legal counsel or make an expenditure or incur an indebtedness for legal services, but the following are exempt from this section[,]” listing state agencies other than the three at issue). This arrangement indicates strongly that the Attorney General, in fulfilling its role as Chief Legal Advisor, would necessarily and inherently have access to and control over the necessary documents for effective legal representation of these state agencies. Therefore, these subpoenas, and the statutory scheme in Arizona regarding how the Attorney General will respond to them, further support the Court’s conclusion that the Arizona Attorney General has legal control, for the purposes of discovery, over at least these the three agencies recently listed in the intent to issue subpoenas.

Relatedly, the Arizona Attorney General has taken the position that communications between the Arizona Attorney General and these state agencies would be covered by the attorney-client privilege if such communications are encompassed within the scope of discovery sought by Meta. [Dkt. 738-2 at 2]. To the extent the Arizona Attorney General has attempted to subdivide its own office between the team litigating this case and other “agency counsel sections” of the state Attorney General, that argument is incorrect. The Arizona Attorney General proffers this argument to limit the attorney-client privilege (and hence the attorney-client relationship) only as to some parts of the state Attorney General’s office but not other sub-teams, without citation to any legal support for that proposition. The scope of attorney-client relationship (and the duties flowing therefrom, including the scope of the attendant attorney-client privilege) encompasses the entirety of a legal services organization due to well-known rules of imputation of confidences to a legal services organization, including a public law office as discussed above. *See, e.g., People ex rel.*

1 *Peters*, 951 P.2d at 930 (“The rule of imputed disqualification applies to both private firms and
 2 public law firms such as a district attorney’s office or the office of the state public defender.”);
 3 *accord City of Cnty. of Denver*, 37 P.3d at 457; *see also Kirk*, 108 Cal. Rptr. 3d at 637–38, 642 (“We
 4 do not doubt that vicarious disqualification is the general rule, and that we should presume
 5 knowledge is imputed to all members of a tainted attorney’s law firm. However, we conclude that,
 6 in proper circumstances, the presumption is a rebuttable one[.]” The court recognizing presumption
 7 of imputed knowledge in the context of government attorneys, which presumption could be rebutted
 8 by proper ethical screening); *cf. also Billings v. State*, 441 S.E.2d 262, 266 (Ga. 1994) (because
 9 individual government lawyer at issue “should be screened from any direct or indirect participation
 10 in the matter,” vicarious disqualification of entire office denied); *cf. also Calhoun v. Area Agency*
 11 *on Aging of Se. Arkansas*, 618 S.W.3d 137, 137 (Ark. 2021) (individual lawyer disqualified when
 12 joining prosecutors’ office but “the entire office in which that attorney works is not disqualified as
 13 long as the disqualified attorney is appropriately screened. Disqualification of the entire prosecuting
 14 office is not necessary absent special facts, such as a showing of actual prejudice; or, perhaps the
 15 screening procedures are ineffective.”).

16 Some jurisdictions treat public legal service organizations like private law firms and impute
 17 shared confidences among lawyers of the entire public law entity. Even in jurisdictions which do
 18 not automatically impute disqualification, and shared confidences, to an entire public law office,
 19 those courts recognize that ethical screening or other procedures are required to avoid either imputed
 20 or actual sharing of confidences to avoid a finding of dissemination of attorney-client privileged
 21 communications within an entire public law organization. This review of case law demonstrates
 22 that no courts support the Arizona Attorney General’s argument that different individual lawyers in
 23 the Attorney General’s office have *ex ante* separable, discrete attorney-client relationships.

24 The Court rejects the Arizona Attorney General’s attempt to simultaneously disclaim the
 25 existence of an attorney-client relationship as between the “team” of attorneys currently working on
 26 this case, while apparently attempting to preserve the ability to assert that the privilege applies to
 27 communications between other lawyers in the Arizona Attorney General’s Office and these
 28 agencies. “[T]o the extent that [the State] asserts an attorney-client privilege with these

1 legislators, it does so solely in their official capacities [I]t is inconsistent for the State to argue
2 that on one hand the [State] Attorney General represents these individuals, but that for discovery
3 purposes the [Plaintiff] United States must resort to Federal Rule of Civil Procedure 45.” *Perez*,
4 2014 WL 1796661, at *2. The fact that the Arizona Attorney General is attempting to preserve the
5 ability to assert the attorney-client privilege between the Arizona Attorney General’s office and the
6 agencies at issue further supports the conclusion of control here. Assertion of the attorney-client
7 privilege requires, as a prerequisite, the existence of an attorney-client relationship. *See United*
8 *States v. Graf*, 610 F.3d 1148, 1156 (9th Cir. 2010).

9 Further, there is no statutory, legal, or administrative rule cited which prohibits the Arizona
10 Attorney General from accessing the documents of the state agencies at issue. To the extent the
11 Arizona Attorney General relies on the statutory origins of that office, such state statutes are
12 unavailing to prohibit a finding of control here. Analogously, in *Osborn*, the Arizona federal
13 Magistrate Judge overruled objections and ordered individual defendants (officials of the Arizona
14 Department of Corrections) to produce personnel documents from the files of the state agency,
15 despite arguments that state statutory restrictions forbade the production of the documents. *Osborn*
16 *v. Bartos*, 2010 WL 3809847 at *15 (D. Ariz. Sept. 20, 2010). The *Osborn* court rejected the
17 arguments of the Arizona Attorney General (representing the defendants in that case) that an under
18 an Arizona statute “they are without authority to produce the records” and that Arizona regulations
19 “make personnel files confidential.” *Id.* The Court ordered the defendants in *Osborn* “to produce,
20 from **whatever personnel or similar file** specifically related to the designated officer, **where such**
21 **records are normally maintained**, the performance appraisals and disciplinary records in Request
22 4 as to the named Defendants[.]” *Id.* at *16 (emphasis added).

23 Further, the Arizona Attorney General does not cite any statutory or legal prohibition on the
24 Arizona Attorney General’s representing the state agencies in this matter for purposes of discovery.
25 The Court recognizes that this is a somewhat unusual situation, in which a law enforcement
26 organization, the attorney general, is both a party to the case while also acting or able to act as
27 counsel for a third party. However, this would not be the first time that a legal services provider, as
28 counsel for a party, is found to have control over third party documents for purposes of discovery.

1 *See, e.g., Becnel*, 2018 WL 691649, at *4 (“Both Salas individually and his law firm, the subpoena
2 recipients and defendants in this court, are counsel of record for the Salas defendants in the Florida
3 lawsuit Thus, a Rule 34 request for production to Salas in the Florida lawsuit required Salas
4 to respond as to responsive materials over which Salas and his law firm had possession, custody or
5 control.”). Indeed, one court has noted that “[i]n general, an attorney is presumed to have control
6 over documents in its client’s possession.” *Perez*, 2014 WL 1796661, at *2. The Court is not
7 holding broadly that there must be a finding of a legal right of access to and thus control over third
8 party client documents in every case involving a legal services provider as a party; rather, under the
9 particular facts here, and under the totality of circumstances viewed in light of applicable legal
10 standards, the Court finds that control exists as to the six agencies represented by the Arizona
11 Attorney General.

12 Indeed, at least one other federal court has previously found that the Arizona Attorney
13 General has legal control over Arizona state agency materials. *Generic Pharmaceuticals (II)*, 699
14 F. Supp. 3d at 357–58. While this Court reaches its own independent conclusions consistent with
15 the applicable legal standards discussed above and in light of the facts and circumstances presented
16 here, the analysis in the *Generic Pharmaceuticals (II)* Multi-District Litigation is certainly
17 consistent with, and to that extent further persuasively supports, the conclusion here with regard to
18 the Arizona Attorney General’s having control with regard to documents of the state agencies at
19 issue. Given that the *Generic Pharmaceuticals (II)* opinion resolved the control issue against all the
20 objecting states including Arizona and given the Arizona Attorney General’s office’s experience in
21 litigating and losing an analogous issue as to authorization to produce documents from agency files
22 in *Osborn*, this Court is disappointed that the Arizona Attorney General and Meta were unable to
23 reach a negotiated resolution of this dispute, which other states were able to do in *Generic*
24 *Pharmaceuticals (II)*. As the Court has repeatedly encouraged the Parties at multiple Discovery
25 Management Conferences, they should make every effort to work out discovery disputes through
26 reasonable, good faith negotiations between able and experienced counsel, particularly where, as
27 here, there is guidance in precedent on the discovery issue at hand.

28 Accordingly, in view of the legal standards and the record viewed in the totality of

1 circumstances, the Court finds that the Arizona Attorney General has control, for the purposes of
2 discovery, over the documents of six of the Arizona agencies at issue, listed above. The Court notes
3 that the Court credits the Arizona Attorney General's offices representation to this Court that the
4 Board of Regents, Commerce Authority, and Governor's office will not be represented by any
5 attorney within the Arizona Attorney General's office for purposes of this case. Should that
6 representation turn out to be in error or shown to be false, the Court will reconsider its findings as
7 to control with regard to those three agencies upon proper motion.

8 **II. CALIFORNIA**

9 In opposition to the control issue, the California Attorney General argues primarily the
10 following factors: (1) the California Attorney General is a separate entity and independent from the
11 California agencies; (2) California agencies are statutorily responsible for maintaining their own
12 records; and (3) if found to be subject to control for purposes of discovery, the California agencies
13 would thereby be granted a "virtual veto" over the California Attorney General's independent
14 responsibilities to bring enforcement actions. [Dkt. 738-3 at 2].

15 In support of a finding of control with regard to these state agencies' documents, Meta argues
16 based primarily on the following factors: (1) California law sets forth a preference for the California
17 Attorney General to be employed as the attorney of all legal matters in which California has an
18 interest; (2) the California Attorney General is presumptively the legal representative of all
19 California agencies in any judicial proceedings unless specifically exempted; and (3) California
20 agencies, with limited exception, are proscriptively barred from obtaining counsel other than the
21 California Attorney General, without consent from the California Attorney General. *Id.* at 3. Here,
22 Meta seeks discovery from the following California Agencies: Business, Consumer Services, and
23 Housing Agency; Department of Child Support Services; Department of Consumer Affairs;
24 Department of Education, Department of Finance; Department of Health Care Services; Department
25 of Public Health; Office of the Governor; Governor's Office of Business and Economic
26 Development; Health and Human Services Agency; Mental Health Services Oversight and
27 Accountability Commission; Office of Data and Innovation; and School Finance Authority. *Id.*

28 After considering the Parties' briefs, oral argument and other material submitted, and

1 applying appropriate legal standards discussed herein, the Court finds that the factors weigh in favor
 2 of a finding that the California Attorney General does have legal control, for purposes of discovery,
 3 over the California agencies in dispute. While the California Attorney General is a separate entity
 4 and while the California agencies maintain their own records, this does not outweigh the requirement
 5 that the California Attorney General is statutorily required to act as the California agencies' counsel,
 6 with limited exceptions which are not shown to be applicable here. *See* Cal. Govt. Code § 11040(a).

7 The California Legislature made clear that the California statutory scheme prefers the
 8 California Attorney General represent state agencies: "It is the intent of the [California] Legislature
 9 that overall efficiency and economy in state government be enhanced by employment of the
 10 Attorney General as counsel for the representation of state agencies and employees in judicial and
 11 administrative adjudicative proceedings." Cal. Govt. Code § 11040(a). The statutory scheme in
 12 California presumes that the California Attorney General will represent state agencies in judicial
 13 actions (even to the exclusion of that agency's own counsel) absent written consent: "Except with
 14 respect to employment by the state . . . agencies specified by . . . name in Section 11041 or when
 15 specifically waived by statute other than Section 11041, a state agency ***shall obtain the written***
 16 ***consent of the Attorney General*** before doing either of the following: (1) Employing in-house
 17 counsel to represent a state agency or employee in any judicial or administrative adjudicative
 18 proceeding. (2) Contracting with outside counsel." *Id.* at § 11040(c) (emphasis added).

19 Further, the California Legislature has made clear "that it is in the best interests of the people
 20 of the State of California that ***the Attorney General be provided with the resources*** needed to
 21 develop and maintain the Attorney General's capability to provide competent legal representation
 22 of state agencies and employees ***in any judicial*** or administrative adjudicative ***proceeding***." *Id.* at
 23 § 11040(a) (emphasis added). Access to documents from state agencies are "resources needed" for
 24 the California Attorney General "to provide competent legal representation of state agencies" in this
 25 action.

26 Indeed, the California Attorney General confirmed that its office could represent all of the
 27 California agencies at issue, if Meta were to serve those agencies with a subpoena in this matter.
 28 [Dkt. 738-1 at 4–5]. The Court notes that the State Attorneys General have filed an Administrative

1 Motion to file supplemental information that Meta has recently served an intent to issue subpoenas
2 to various state agencies, including the California Department of Child Support Services, the
3 California Department of Education, and the California Mental Health Services Oversight and
4 Accountability Commission. [Dkt. 1031-3 at 27–153]. None of these state agencies are allowed to
5 employ legal counsel other than the California Attorney General absent written consent, and no such
6 consent has been presented thus far. Accordingly, and based on the record before the Court, it
7 appears that under the statutory scheme each will be represented by the California Attorney General
8 in this matter for discovery, whether because of the intended subpoenas or because the Court finds
9 control for purposes of discovery. *See* Cal. Govt. Code § 11040(a). Thus, as a matter of the efficient
10 and rational administration of justice in this case, because the California Attorney General will be
11 involved in representing these state agencies in any event in this case (whether to respond to
12 subpoenas or to respond to party discovery), the Court in its discretion determines that a finding of
13 control is further supported by the simple and pragmatic realities involved in these circumstances.

14 At oral argument, counsel for the California Attorney General argued that, even if the Court
15 found that the California Attorney General had legal access and control over the California state
16 agencies' materials, those state agencies could disagree and simply refuse to provide requested
17 documents to the California Attorney General and could hypothetically put the California Attorney
18 General in a position of being at risk of sanctions through no fault of its own. This is a variation on
19 the “virtual veto” argument, discussed above, which the Court finds unpersuasive to rebut the
20 finding of control. The California Attorney General's argument asserts that their office lacks any
21 legal mechanism to force or require compliance from the state agencies, which in their view
22 demonstrates lack of control. *Id.* This argument is without merit. First, this argument rests entirely
23 on an unreasonable, unfounded, hypothetical assumption that, despite this Court issuing an Order
24 finding control, the state agencies would simply refuse to provide documents based on nothing more
25 than an obstinate and unreasoned disagreement. The California Attorney General presented no facts,
26 no affidavits, no prior examples of state agency refusals, and no testimony to support this feared
27 response by California state agencies.

28 Indeed, in many analogous cases in which a California prison official was sued individually,

the courts found that the individual official had control over documents of a state agency (the California Department of Corrections and Rehabilitation (CDCR)) and thus the state agency was subject to party discovery – and those findings are based in part on the fact that the individual party defendants were represented by and/or employed by the California Attorney General:

If Defendants seek to avoid production by contending that they are not in possession, custody or control of the requested documents, their objection is denied. The specific facts of this action render such an objection unfounded. By virtue of their employment with non-party CDCR, individual defendants are represented by the Attorney General's Office. It is this Court's experience that either individual defendants who are employed by CDCR and/ or the Attorney General can generally obtain documents, such as the ones at issue here, from CDCR by requesting them. They have constructive control over the requested documents, and the documents must be produced.

Pulliam, 2011 WL 335866, at *1; *see also Quiroga*, 2013 WL 6086668, at *2 (affirming Magistrate Judge order finding defendant has control over third-party agency documents: "it is this Court's experience that either individual defendants who are employed by CDCR, and/or the Attorney General who represents them, can generally obtain documents from CDCR by requesting them. If this is the case, then, based on their relationship with CDCR, they have constructive control over the requested documents and the documents must be produced."); *accord Mitchell*, 2009 WL 674348, at *9, 11–13, 17 (rejecting multiple objections regarding alleged lack of control of agency documents).

Similarly, in *Zackery*, the Court overruled the objection that the named defendants lacked control over the documents of a third-party agency. *Zackery*, 2007 WL 1655634, at *4. The *Zackery* Court granted relief to the Plaintiff seeking discovery as follows: "the court will direct **counsel for defendants** [Office of the City Attorney] to make the necessary inquiries and arrangements for the requested citizen complaint records to be produced to plaintiff." *Id.* These California precedents make clear that courts in California have in fact found control in numerous factual situations in which the involvement of the same prosecuting attorneys (often the California Attorney General) representing both a named party and the third-party agency supported the conclusion of control such that the California agency documents were subject to party discovery.

To be clear, the Court is not relying on these precedents to demonstrate the practical ability

1 of the state Attorney General to obtain documents from the state agencies, rather these precedents
2 rebut and demonstrate exactly the opposite of the hypothetical fear of agency refusal posited by the
3 state Attorneys General as a reason why they should be found not to have control for purposes of
4 discovery. Contrary to the unfounded assumption that state agencies will refuse to provide
5 documents, the Court presumes, instead, that parties (including third parties such as the agencies at
6 issue here) will act reasonably in the face of a court Order and will comply with the Federal Rules
7 of Civil Procedure. “We think that surely one must assume that litigants will obey court orders.
8 Once we assume otherwise, then our system of jurisprudence is in serious trouble.” *E. I. du Pont*
9 *de Nemours & Co. v. Finklea*, 442 F. Supp. 821, 825 (S.D. W. Va. 1977); *see also Casas v. City of*
10 *Baldwin Park*, No. B270313, 2017 WL 1153336, at *6 (Cal. Ct. App. 2017) (The Court recognized
11 the existence of “the legal presumption that defendants had regularly discharged their duties and
12 complied with the court’s order.”).

13 Second, this argument ignores the fact that Meta has the ability to file a motion to compel
14 production of documents by any such hypothetically disagreeing state agencies, and thus there is
15 indeed a procedural and legal avenue to enforce compliance from any such hypothetically
16 intransigent agencies. The state Attorneys General’s argument that they lack legal mechanism to
17 force compliance from their state agencies is myopic. Should Meta be required to file a motion to
18 compel, the Court is perspicacious enough to understand that the fault would lie with the
19 hypothetical state agency and not the California Attorney General, and in the event some
20 enforcement mechanism were needed (such as the hypothetically feared sanctions), the Court would
21 presumably have the wisdom to understand how and where to focus any such enforcement Order.

22 Finally, the Court is not persuaded by the argument that the California Attorney General
23 lacks control over state agency documents, because an attorney in a court proceeding can simply do
24 nothing when faced with a client who (hypothetically here) refuses to collect or provide documents
25 for production in discovery. As counsel for a party subject to discovery, the California Attorney
26 General has the legal authority and duty to take action to make inquiry and collect the documents
27 from the uncooperative state agencies directly, and cannot simply sit on their hands in the face of
28 an uncooperative client – this is would not be the first time an attorney was faced with a client who

1 was difficult to deal with in collecting documents for discovery. *See, e.g., Qualcomm Inc.*, 2010
2 WL 1336937, at *2–5. Counsel in a litigation has legal duties to take pro-active steps in supervising
3 and searching for documents in discovery that go far beyond simply acceding to a client who fails
4 to (or worse, refuses to) produce or provide documents. *Id.* at *2–5 (detailing “Discovery Errors”
5 by counsel); *Rodman*, 2016 WL 5791210, at *3–4 (awarding discovery sanctions where, in part,
6 “there is no indication that Safeway’s counsel guided or monitored [client employee] Mr. Guthrie’s
7 search of the legacy drive in any significant way.”). Counsel cannot simply advise clients about
8 document requests and leave it up to the client to decide whether or not to risk sanctions for failure
9 to produce – in appropriate circumstances, counsel may need to personally conduct or directly
10 supervise a client’s collection, review, and production of responsive documents. *Optronic Techs.,*
11 *Inc.*, 2020 WL 2838806, at *5–7 (awarding discovery sanctions; “It is not enough for counsel to
12 provide advice and guidance to a client about how to search for responsive documents, and then not
13 inquire further about whether that advice and guidance were followed The Court does not
14 conclude that counsel must always personally conduct or directly supervise a client’s collection,
15 review, and production of responsive documents. However, in the circumstances presented here,
16 the Court finds that [counsel] Sheppard Mullin did not make a reasonable effort to ensure that
17 [sanctioned party] Ningbo Sunny produced all the documents responsive to Orion’s requests and
18 thus violated its obligations under Rule 26(g)(1)(B) [T]he Court orders Ningbo Sunny’s new
19 counsel of record to undertake an independent effort to ensure that Ningbo Sunny fully complies
20 with Orion’s post-judgment document requests.”). The Court rejects as legally erroneous the
21 California Attorney General’s arguments, because they are based on a misunderstanding of
22 counsel’s role (and duties) in discovery and the available procedures under the Federal Rules for the
23 proper conduct of discovery and the rational administration of justice. *See King*, Case No. 20-cv-
24 04322-LGS-OTW, Dkt. 272, slip op. at 2 (“embroil[ing the judge] in day-to-day supervision of
25 discovery [is] a result directly contrary to the overall scheme of the federal discovery rules.”).

26 In addition to their duties to supervise the collection of documents and make inquiry of
27 clients to ensure proper collection of documents is undertaken, attorneys representing clients in court
28 proceedings have legal duties under the Federal Rules of Civil Procedure to work cooperatively to

1 improve the administration of civil justice, both as officers of the Court and under their ethical
 2 obligations as members of the bar of this Court. *See* Fed. R. Civ. P. 1 advisory committee’s note to
 3 2015 amendment. “Rule 26(g) imposes ***an affirmative duty to engage in pretrial discovery in a***
 4 ***responsible manner*** that is consistent with the spirit and purposes of Rules 26 through 37 The
 5 subdivision provides a deterrent to both excessive discovery and evasion by imposing a certification
 6 requirement that ***obliges each attorney*** to stop and think about the legitimacy of a discovery request,
 7 ***a response thereto, or an objection*** If primary responsibility for conducting discovery is to
 8 continue to rest with the litigants, they must be obliged to act responsibly and avoid abuse.” *See*
 9 Fed. R. Civ. P. 26 advisory committee’s note to 1983 amendment.

10 As the Ninth Circuit has recognized, “legal duties” are jural correlatives and logically
 11 antecedent to “legal rights” – and thus the California Attorney General’s legal duties to undertake
 12 proactive efforts to collect documents from clients in discovery are the flip side to the legal right to
 13 access those documents. *Newman v. Sathyavaglswaran*, 287 F.3d 786, 790 n.5 (9th Cir. 2002) (“The
 14 logical relationship between rights and duties has been the subject of considerable academic
 15 examination. Wesley Hohfeld famously described rights and duties as ‘jural correlatives’—
 16 different aspects of the same legal relation. Oliver Wendell Holmes described rights as ‘intellectual
 17 constructs used to describe the consequences of legal obligations. [sic] As he puts it [in *The*
 18 *Common Law* (1881)], ‘legal duties are logically antecedent to legal rights.’”) (internal citations
 19 omitted). Here, the recognition that a state Attorney General, presumptively counsel for state
 20 agencies here, has legal duties to supervise the collection of (and possibly directly obtain) documents
 21 from those agencies for discovery lends further support to the conclusion that the state Attorney
 22 General has the legal right to access those documents. That is, counsel’s legal duty to ensure
 23 collection of documents from a client is a different aspect of (and correlates juridically to) a legal
 24 right to access those documents, and thus supports the conclusion of control for purposes of
 25 discovery.

26 The California Attorney General’s role as counsel for the agencies at issue inherently
 27 involves obtaining necessary documents for effective representation in litigation. In acting as
 28 counsel, the California Attorney General would necessarily have access to and thus control over the

relevant documents needed to respond to discovery requests. *See Monsanto*, 2023 WL 4083934, at *5–6 (finding state Attorney General has control over agency documents “based on his broad statutory and common law powers to control and manage legal affairs on behalf of state agencies, has a legal right to obtain responsive documents from the state agencies referenced in the Complaint”). To the extent the California Attorney General argues that these agencies are “separate entities under law” from the state Attorney General and are not supervised by the state Attorney General, *see* dkt. 738-3 at 2, that argument misapprehends the “legal control” test for documents – the issue is not simply whether one entity is under the day-to-day operational control of the other (such as a parent-wholly-owned-subsidiary relationship), and not simply whether the two entities are legally separate (such as two different and separately incorporated entities), but rather whether there is a legal right to obtain the documents as explained by *Citric Acid*. “The control analysis for Rule 34 purposes does not require the party to have actual managerial power over the foreign corporation, but rather that there be close coordination between them.” *St. Jude Medical S.C., Inc.*, 305 F.R.D. at 638. Here, the attorney-client relationship between the state Attorney General and the state agencies (a relationship mandated by state law) necessitates close coordination. While operational control may be a factual situation which demonstrates a legal right to obtain the documents, the absence of such “executive or functional control” is not determinative for evaluating “control” for purposes of discovery. By definition, the “legal control” issue for discovery arises when there are two legally distinct or separate entities – otherwise, if only one entity were involved, there would be no dispute that party discovery covered that one entity. As discussed above, courts have found “control” for purposes of discovery where a party is clearly not in managerial control over the third-party, such as a subsidiary having control over the documents of a parent corporation, or an individual government officer having control over the documents of an entire agency. Thus, arguing that the agencies “operate outside the California Attorney General’s authority” or are “established as a separate entity, under various laws or constitutional provisions” is simply re-stating the issue, *id.*, and not determinative of the issue. Arguing that the agencies are “controlled” by the Governor or another “independently elected official” in a “divided executive” under the California Constitution, *id.*, confuses and conflates the “legal control” issue for discovery with “operational

1 control” or “independence” and thus constitutes a legally erroneous argument.

2 Further, there is no statutory, legal, or administrative rule cited which prohibits the California
3 Attorney General from accessing the documents of the state agencies at issue. Nor is there citation
4 to any statutory or legal prohibition on the California Attorney General’s representing the state
5 agencies in this matter for purposes of discovery. The Court recognizes that this is a somewhat
6 unusual situation, in which a law enforcement organization (the Attorney General) is both a party
7 to the case while also acting as counsel for a third party. However, this would not be the first time
8 that a legal services provider, as a party, is found to have control over third party documents for
9 purposes of discovery. *See, e.g., Becnel*, 2018 WL 691649, at *4 (“Both Salas individually and his
10 law firm, the subpoena recipients and defendants in this court, are counsel of record for the Salas
11 defendants in the Florida lawsuit Thus, a Rule 34 request for production to Salas in the Florida
12 lawsuit required Salas to respond as to responsive materials over which Salas and his law firm had
13 possession, custody or control.”). Indeed, one court has noted that “[i]n general, an attorney is
14 presumed to have control over documents in its client’s possession.” *Perez*, 2014 WL 1796661, at
15 *2. The Court is not holding broadly that there must be a finding of a legal right of access to and
16 thus control over third party client documents in every case involving a legal services provider as a
17 party; rather under the particular facts here and under the totality of circumstances viewed in light
18 of applicable legal standards, the Court finds that control exists here.

19 Consistent with the analysis of this issue as raised by other state Attorneys General, the Court
20 finds the California Attorney General’s “virtual veto” argument unpersuasive. [Dkt. 738-3 at 2].
21 As explained above (and incorporated herein by reference), the “virtual veto” argument is entirely
22 speculative. This argument is based on an unfounded assumption that state agencies would
23 inexplicably obstruct a state attorney general’s independent law enforcement responsibilities. The
24 argument also directly contradicts the well-established legal principle and statutory scheme that a
25 state Attorney General, acting as counsel, inherently has access to relevant documents to effectively
26 represent a state agency.

27 Finally, the Court has recognized that the issue of control of state agency documents when
28 a State is a party has been litigated and decided against numerous States in a previous Multi-District

Litigation involving most of the same States and state Attorneys General as are involved in this case. *Generic Pharmaceuticals (II)*, 699 F. Supp. 3d at 357–58. The *Generic Pharmaceuticals (II)* opinion not only ruled against the objecting States, but also helpfully identified numerous States which withdrew their objections to party discovery and negotiated a resolution of this issue with the opposing party there. *Id.* at 356 n.5. In that case, California is identified as one of the States which reached agreement on the state agency control issue without requiring that court to expend resources resolving the dispute there. *Id.* As discussed above, the California Attorney General has, from this Court’s review of precedent, repeatedly litigated and lost on the analogous issue of control of state agency documents in cases involving a state official sued individually, typically involving control over documents of the California Department of Corrections and Rehabilitation. Other states have apparently repeatedly litigated and lost the same issue, resulting in one court within the Ninth Circuit warning a state Attorney General to avoid unnecessarily multiplying the proceedings and risk sanctions. *Emanuel v. Collins*, No. 3:20-CV-0566-RCJ-CLB, 2022 WL 22236619, at *3 n.2 (D. Nev. July 20, 2022) (Finding control: “This Court has expressly rejected similar arguments made by NDOC [(Nevada Department of Corrections)] and its counsel in the past. Therefore, Defendants and their counsel are cautioned and reminded that improper discovery conduct in this, or other cases, may result in discovery sanctions in the future.”) (citation omitted). Given that the *Generic Pharmaceuticals (II)* opinion resolved the control issue against all the remaining objecting states in that case, given that California was able to reach a negotiated resolution of the dispute in that Multi-District Litigation, and further given the California Attorney General’s repeatedly litigating and losing a similar control issue in the face of multiple reasoned decisions adverse to the California Attorney General, this Court is disappointed that the California Attorney General and Meta were unable to reach a negotiated resolution of this dispute. As the Court has repeatedly encouraged the Parties at multiple Discovery Management Conferences, they should make every effort to work out discovery disputes through reasonable, good faith negotiations between able and experienced counsel, particularly where (as here) there is guidance in precedent on the discovery issue at hand.

III. COLORADO

In opposition to the control issue, the Colorado Attorney General argues primarily the

1 following factors: (1) the Colorado Attorney General brought the lawsuit under its own independent
 2 law enforcement capacity; (2) the Colorado legislature has recognized that the Colorado Attorney
 3 General cannot access Colorado agencies' documents when it is acting in its enforcement capacity;
 4 and (3) the Colorado Attorney General is a separate entity and independent from the Colorado
 5 agencies. [Dkt. 738-4 at 2].

6 In support of a finding of control with regard to these state agencies' documents, Meta argues
 7 based primarily on the following factors: (1) Colorado agencies are proscriptively barred from
 8 retaining litigation counsel other than the Colorado Attorney General; (2) the Colorado Attorney
 9 General has already confirmed that it would represent the identified agencies in responding to a
 10 Meta subpoena; and (3) the Colorado Attorney General admits that it intends to assert privilege
 11 claims. *Id.* at 3. Here, Meta seeks discovery from the following agencies: Behavioral Health
 12 Administration; Department of Education; Department of Higher Education; Department of Human
 13 Services; Department of Regulatory Agencies; Office of the Governor; Office of Economic
 14 Development & International Trade; and Office of State Planning and Budgeting. *Id.*

15 After considering the factors argued in the briefs, the Court finds that the factors weigh in
 16 favor of a finding that the Colorado Attorney General does have legal control, for purposes of
 17 discovery, over the Colorado agencies in dispute. While the Colorado Attorney General is a separate
 18 entity and while the Colorado Attorney General did bring the instant action pursuant to its own
 19 independent authority, this does not outweigh the requirement that the Colorado Attorney General
 20 must statutorily act as the Colorado agencies' counsel. Colo. Rev. Stat. § 24-31-101(1)(a). Under
 21 Colorado's statutory scheme, "[t]he attorney general: ***Shall act*** as the chief legal representative of
 22 the state ***and be the legal counsel*** and advisor ***of each*** department, division, office, board,
 23 commission, bureau, and ***agency of state government***[.f"]. *Id.* (emphasis added); *see also* Colo.
 24 Rev. Stat. § 24-31-111(1) ("The attorney general ***shall*** provide legal services for each state agency
 25 as provided in section 24-31-101.") (emphasis added). Under Colorado law, "[n]o state agency shall
 26 appoint, solicit, or employ any person to perform legal services except in accordance with this part
 27 1." Colo. Rev. Stat. § 24-31-111(2). None of the statutory exceptions in section -111, which
 28 requires a finding by the Colorado Governor of a failure or refusal to provide legal representation

1 by the Colorado Attorney General, are argued or present in this case. Colo. Rev. Stat. § 24-31-
2 111(5).

3 Indeed, the Colorado Attorney General confirmed that its office will represent all of the
4 Colorado agencies at issue if Meta were to serve those agencies with a subpoena in this matter.
5 [Dkt. 738-1 at 6]. The Court notes that the State Attorneys General have filed an Administrative
6 Motion to file supplemental information that Meta has recently served an intent to issue subpoenas
7 to various state agencies, including the Colorado Behavioral Health Administration and the
8 Colorado Department of Education. [Dkt. 1031-3 at 154–237]. Neither of these state agencies are
9 allowed to employ legal counsel other than the Colorado Attorney General absent a finding by the
10 Colorado Governor that the Colorado Attorney General has been unable, failed to, or refuses to
11 provide legal services to the agencies, and no exceptions to an agency’s prohibition on employing
12 separate counsel has been presented thus far. *See* Colo. Rev. Stat. § 24-31-111(5). Accordingly, it
13 appears that under the statutory scheme each agency will be represented by the Colorado Attorney
14 General in this matter for discovery. *See* Colo. Rev. Stat. § 24-31-101(1)(a). Thus, because the
15 Colorado Attorney General appears likely to be involved in representing these state agencies in any
16 event in this case, whether to respond to subpoenas or to respond to party discovery.

17 Relatedly, the Colorado Attorney General has taken the position that communications
18 between the Colorado Attorney General and these state agencies would be covered by the attorney-
19 client privilege when the Colorado Attorney General is legal counsel for a state agency. [Dkt. 738-
20 4 at 2]. “[T]o the extent that [the State] asserts an attorney-client privilege with these legislators,
21 it does so solely in their official capacities [I]t is inconsistent for the State to argue that on one
22 hand the [State] Attorney General represents these individuals, but that for discovery purposes the
23 [Plaintiff] United States must resort to Federal Rule of Civil Procedure 45.” *Perez*, 2014 WL
24 1796661, at *2. To the extent the Colorado Attorney General is asserting that the attorney-client
25 privilege applies to communications between the Colorado Attorney General’s office and the
26 agencies at issue when they are represented (as they will be here) by that office, that further supports
27 the conclusion of control here. Assertion of the attorney-client privilege requires, as a prerequisite,
28 the existence of an attorney-client relationship. *See Graf*, 610 F.3d at 1156.

Further, there is no statutory, legal, or administrative rule cited which prohibits the Colorado Attorney General from accessing the documents of the state agencies at issue. While the Colorado Attorney General cites a statute which requires their office to enter into information sharing agreements with state licensing agencies in enforcement actions, none of the agencies at issue here are licensing agencies. Colo. Rev. Stat. § 6-1-116(4). Indeed, it is clear that the Colorado Legislature’s view is that “it best serves the consumer protection interests of the state to allow a licensing authority to share with a district attorney or the attorney general information regarding a regulated person, which information may be relevant to a consumer protection investigation of the regulated person” and that “District attorneys and the attorney general are tasked with, and have the expertise needed for, enforcing consumer protection laws in the state.” Colo. Rev. Stat. § 6-1-116(1)(b)–(d). Viewed in context, the Colorado Legislature expressed its intention that these state licensing authorities would share information with the Colorado Attorney General specifically to “*facilitate* the investigation and *enforcement of complaints* alleging violations of consumer protection or unfair trade laws.” Colo. Rev. Stat. § 6-1-116(4) (emphasis added). Thus, the cited statute does not serve as a prohibition on the Colorado Attorney General’s access to these licensing agencies’ documents, but to the contrary serves as an encouraged means for sharing information in order to “facilitate” enforcement actions. The statute provides for a procedural, legal mechanism, approved by the Colorado Legislature, for these licensing agencies to share information with the Colorado Attorney General. If anything, the statute cited by the Colorado Attorney General further supports a finding of legal right of access and thus control over these licensing agency documents, and the Court finds the Colorado Attorney General’s characterization of this statute as barring access or evidence of lack of right to access as erroneous.

Further, to the extent the Colorado Attorney General argues that there must be an information sharing agreement from licensing agencies in order to disclose the agencies’ records, this argument is in essence the same “virtual veto” argument advanced by several other states’ Attorneys General and discussed above. As explained previously, the Court finds the “virtual veto” argument to be speculative and unpersuasive. This argument is based on an unfounded assumption that state agencies would inexplicably obstruct a state’s attorney general’s independent law enforcement

1 responsibilities. The argument also directly contradicts the well-established legal principle and
2 statutory scheme that a state attorney general, acting as counsel, inherently has access to relevant
3 documents to effectively represent a state agency. Finally, as noted, none of the Colorado agencies
4 at issue in this case are licensing authorities and thus the statute regarding an information sharing
5 agreement is not applicable to the agencies under consideration here.

6 There is no citation to any statutory or legal prohibition on the Colorado Attorney General's
7 representing the state agencies in this matter for purposes of discovery. The Court recognizes that
8 this is a somewhat unusual situation, in which a law enforcement organization, the attorney general,
9 is both a party to the case while also acting as counsel for a third party. However, this would not be
10 the first time that a legal services provider, as counsel for a party, is found to have control over third
11 party documents for purposes of discovery. *See, e.g., Becnel*, 2018 WL 691649, at *4 ("Both Salas
12 individually and his law firm, the subpoena recipients and defendants in this court, are counsel of
13 record for the Salas defendants in the Florida lawsuit Thus, a Rule 34 request for production
14 to Salas in the Florida lawsuit required Salas to respond as to responsive materials over which Salas
15 and his law firm had possession, custody or control."). Indeed, one court has noted that "[i]n general,
16 an attorney is presumed to have control over documents in its client's possession." *Perez*, 2014 WL
17 1796661, at *2. The Court is not holding broadly that there must be a finding of a legal right of
18 access to and thus control over third party client documents in every case involving a legal services
19 provider as a party; rather, under the particular facts here, and under the totality of circumstances
20 viewed in light of applicable legal standards, the Court finds that control exists here.

21 Finally, the Court has recognized that the issue of control of state agency documents, when
22 a State or State Attorney General is a party, has been litigated and decided in a previous Multi-
23 District Litigation involving most of the same States and State Attorneys General as are involved in
24 this case. *Generic Pharmaceuticals (II)*, 699 F. Supp. 3d at 357–58. The *Generic Pharms.* opinion
25 not only ruled against the objecting States, but also helpfully identified numerous States which
26 withdrew their objections to party discovery and negotiated a resolution of this issue with the
27 opposing party there. *Id.* at 365 n.5. In that case, Colorado is identified as one of the States which
28 reached agreement on the state agency control issue without requiring that court to expend resources

1 resolving the dispute there. *Id.* Given that the *Generic Pharmaceuticals (II)* opinion resolved the
2 control issue against all the remaining objecting states and given that Colorado was able to reach a
3 negotiated resolution of the dispute in that Multi-District Litigation, the Court is disappointed that
4 the Colorado Attorney General and Meta unable to reach a negotiated resolution here as well. As
5 the Court has repeatedly encouraged the Parties at multiple Discovery Management Conferences,
6 they should make every effort to work out discovery disputes through reasonable, good faith
7 negotiations between able and experienced counsel, particularly where, as here, there is guidance in
8 precedent on the discovery issue at hand.

9 **IV. CONNECTICUT**

10 In opposition to the control issue, the Connecticut Attorney General argues primarily the
11 following factors: (1) the Connecticut Attorney General brought the lawsuit under its own
12 independent law enforcement capacity; (2) the Connecticut Attorney General is a separate entity
13 and independent from the Connecticut agencies; and (3) the Connecticut agencies would create a
14 “virtual veto” over the Connecticut Attorney General’s independent responsibilities to bring
15 enforcement actions. [Dkt. 738-5 at 2].

16 In support of a finding of control with regard to these state agencies’ documents, Meta argues
17 primarily that the Connecticut Attorney General must act as counsel for the Colorado agencies. *Id.*
18 at 3. Here, Meta seeks discovery from the following agencies: Commission for Educational
19 Technology; Department of Consumer Protection (the agency responsible for “authoriz[ing] the
20 [Connecticut Attorney General]” to bring this suit); Department of Economic and Community
21 Development; Department of Education; Department of Mental Health and Addiction Services;
22 Department of Public Health; Department of Children and Families; Office of Health Strategy;
23 office of Higher Education; Office of Policy and Management; Office of the Child Advocate; Office
24 of the Governor; and Office of the State Comptroller. *Id.*

25 After considering the factors argued in the briefs, the Court finds that the factors weigh in
26 favor of a finding that the Connecticut Attorney General does have legal control, for purposes of
27 discovery, over the Connecticut agencies in dispute. While the Connecticut Attorney General is a
28 separate entity and while the Connecticut Attorney General did bring the instant action in its own

1 independent authority, this does not outweigh the requirement that the Connecticut Attorney
2 General must statutorily act as the Connecticut agencies' counsel. Conn. Gen. Stat. § 3-125.

3 Under Connecticut's statutory scheme, "[t]he Attorney General shall have general
4 supervision over all legal matters in which the state is an interested party, except those legal matters
5 over which prosecuting officers have direction." *Id.* Further, the Connecticut Attorney General
6 "shall appear for . . . all heads of departments and state boards, commissioners, agents, inspectors,
7 committees, auditors, chemists, directors, harbor masters, and institutions . . . in all suits and other
8 civil proceedings . . . in which the state is a party or is interested . . . in any court or other tribunal,
9 as the duties of his office require[.]" *Id.* Such representation is for "all such suits shall be conducted
10 by [the Connecticut Attorney General] or under [their] direction." *Id.*

11 Indeed, the Connecticut Attorney General confirmed that its office will represent all of the
12 Connecticut agencies at issue if Meta were to serve those agencies with a subpoena in this matter.
13 [Dkt. 738-1 at 7–8]. Accordingly, it appears undisputed that under the Connecticut statutory scheme
14 each will be represented by the Connecticut Attorney General in this matter for discovery. *See*
15 Conn. Gen. Stat. § 3-125. Thus, because the Connecticut Attorney General appears likely to be
16 involved in representing these state agencies in any event in this case, whether to respond to
17 subpoenas or to respond to party discovery.

18 Further, the Connecticut Department of Consumer Protection is, under Connecticut law,
19 tasked with authorizing the Connecticut Attorney General to bring Connecticut Unfair Trade
20 Practices Act enforcement actions such as the current action. *See* Conn. Gen. Stat. § 42-110m. The
21 Connecticut Attorney General has taken the position that communications between its office and
22 the Connecticut Department of Consumer Protection regarding authorizing this action (with no
23 limitation as to time frame) is subject to the attorney-client privilege. [Dkt. 738-5 at 2]. By
24 definition, an attorney-client relationship is a prerequisite to assertion of the attorney-client
25 privilege. *See Graf*, 610 F.3d at 1156. Thus, the Connecticut Attorney General's admission that it
26 has an existing (indeed pre-existing) attorney-client relationship with this specific state agency
27 regarding this matter lends further support for a finding of a legal right of access and thus control
28 over the documents of the Connecticut Department of Consumer Protection. Regardless of whether

1 or not there is control with regard to the other Connecticut state agencies, the position of the
2 Connecticut Department of Consumer Protection is markedly different and, at a minimum, the Court
3 finds that the Connecticut Attorney General's office has legal right to access and thus control over
4 the documents of the Connecticut Department of Consumer Protection for purposes of discovery in
5 this matter.

6 Relatedly, the Connecticut Attorney General has taken the position that communications
7 between the Connecticut Attorney General and the other state agencies at issue would be covered
8 by the attorney-client privilege when the Connecticut Attorney General is legal counsel for those
9 state agency. [Dkt. 738-4 at 2]. "[T]o the extent that [the State] asserts an attorney-client privilege
10 with these legislators, it does so solely in their official capacities [I]t is inconsistent for the
11 State to argue that on one hand the [State] Attorney General represents these individuals, but that
12 for discovery purposes the [Plaintiff] United States must resort to Federal Rule of Civil Procedure
13 45." *Perez*, 2014 WL 1796661, at *2. The fact that the Connecticut Attorney General is asserting
14 the attorney-client privilege applies to communications between the Connecticut Attorney General's
15 office and the agencies at issue when they are represented (as they will be here) by that office further
16 supports the conclusion of control here.

17 In addition, there is no statutory, legal, or administrative rule cited which prohibits the
18 Connecticut Attorney General from accessing the relevant documents of any of the state agencies at
19 issue. There is no citation to any statutory or legal prohibition on the Connecticut Attorney
20 General's representing the state agencies in this matter for purposes of discovery. The Court
21 recognizes that this is a somewhat unusual situation, in which a law enforcement organization, the
22 attorney general, is both a party to the case while also acting as counsel for a third party. However,
23 this would not be the first time that a legal services provider, as counsel for a party, is found to have
24 control over third party documents for purposes of discovery. *See, e.g., Becnel*, 2018 WL 691649,
25 at *4 ("Both Salas individually and his law firm, the subpoena recipients and defendants in this
26 court, are counsel of record for the Salas defendants in the Florida lawsuit Thus, a Rule 34
27 request for production to Salas in the Florida lawsuit required Salas to respond as to responsive
28 materials over which Salas and his law firm had possession, custody or control."). Indeed, one court

1 has noted that “[i]n general, an attorney is presumed to have control over documents in its client’s
2 possession.” *Perez*, 2014 WL 1796661, at *2. The Court is not holding broadly that there must be
3 a finding of a legal right of access to and thus control over third party client documents in every
4 case involving a legal services provider as a party; rather, under the particular facts here, and under
5 the totality of circumstances viewed in light of applicable legal standards, the Court finds that
6 control exists here.

7 The Connecticut Attorney General’s role as counsel for the agencies at issue inherently
8 involves obtaining necessary documents for effective representation in litigation. In acting as
9 counsel, the Connecticut Attorney General would necessarily have access to and thus control over
10 the relevant documents needed to respond to discovery requests. *See Monsanto*, 2023 WL 4083934,
11 at *5–6 (finding state Attorney General has control over agency documents “based on his broad
12 statutory and common law powers to control and manage legal affairs on behalf of state agencies,
13 has a legal right to obtain responsive documents from the state agencies referenced in the
14 Complaint”). To the extent the Connecticut Attorney General argues that the Connecticut
15 Constitution establishes the Governor and the Attorney General as “independently elected officials
16 filling separate constitutionally created offices,” *see* dkt. 738-5 at 2, that argument misapprehends
17 the “legal control” test for documents – the issue is not simply whether the two entities are legally
18 separate (such as two different and separately incorporated entities or legally established entities),
19 but rather whether there is a legal right to obtain the documents as explained by *Citric Acid*. ““The
20 control analysis for Rule 34 purposes does not require the party to have actual managerial power
21 over the foreign corporation, but rather that there be close coordination between them.”” *St. Jude*
22 *Medical S.C., Inc.*, 305 F.R.D. at 638. Here, the attorney-client relationship between the state
23 Attorney General and the state agencies (a relationship mandated by state law) necessitates close
24 coordination. While operational control may be a factual situation which demonstrates a legal right
25 to obtain the documents, the absence of such “executive or functional control” is not determinative
26 for evaluating “control” for purposes of discovery. By definition, the “legal control” issue for
27 discovery arises when there are two legally distinct or separate entities – otherwise, if only one entity
28 were involved, there would be no dispute that party discovery covered that one entity. As discussed

1 above, courts have found “control” for purposes of discovery where a party is clearly not in
2 managerial control over the third-party, such as a subsidiary having control over the documents of
3 a parent corporation, or an individual government officer having control over the documents of an
4 entire agency. Thus, arguing that the Connecticut Attorney General is separate from the executive
5 branch agencies under the control of the Governor is merely a restatement of the issue and not
6 determinative of the issue. *Id.* Arguing that the agencies are “controlled” by the Governor (who is
7 an “independently elected official” in a “dual executive” under the Connecticut Constitution)
8 confuses and conflates the “legal control” issue for discovery with “operational control” or
9 “independence” and thus constitutes a legally erroneous argument.

10 Finally, to the extent the Connecticut Attorney General asserts essentially the same “virtual
11 veto” argument advanced by several other States’ Attorneys General, as discussed above the Court
12 finds the “virtual veto” argument to be speculative and unpersuasive. This argument is based on an
13 unfounded assumption that state agencies would inexplicably obstruct a state’s attorney general’s
14 independent law enforcement responsibilities. The argument also directly contradicts the well-
15 established legal principle and statutory scheme that a state attorney general, acting as counsel,
16 inherently has access to relevant documents to effectively represent a state agency.

17 Indeed, at least one other federal court has previously found that the Connecticut Attorney
18 General has legal control over Connecticut state agency materials. *Generic Pharmaceuticals (II)*,
19 699 F. Supp. 3d at 357–58. While this Court reaches its own independent conclusions consistent
20 with the applicable legal standards discussed above and in light of the facts and circumstances
21 presented here, the analysis in the *Generic Pharmaceuticals (II)* Multi-District Litigation is certainly
22 consistent with, and to that extent further persuasively supports, the conclusion here with regard to
23 the Connecticut Attorney General’s having control with regard to documents of the state agencies
24 at issue. Given that the *Generic Pharmaceuticals (II)* opinion resolved the control issue against all
25 the objecting states including Connecticut, this Court is disappointed that the Connecticut Attorney
26 General and Meta were unable to reach a negotiated resolution of this dispute, which other states
27 were able to do in *Generic Pharmaceuticals (II)*. As the Court has repeatedly encouraged the Parties
28 at multiple Discovery Management Conferences, they should make every effort to work out

discovery disputes through reasonable, good faith negotiations between able and experienced counsel, particularly where, as here, there is guidance in precedent on the discovery issue at hand.

Therefore, the Court concludes that the Connecticut Attorney General has legal control, for the purposes of discovery, over the documents held by the Connecticut agencies listed by Meta.

V. DELAWARE

In opposition to the control issue, the Delaware Attorney General argues primarily the following factors: (1) Delaware law explicitly indicates that the Delaware Department of Justice does not have a right to access Delaware state agency documents in lieu of discovery under a state statute; and (2) Delaware case law has previously held that control over documents turns on whether a party has the power, unaided by courts, to force document production. [Dkt. 738-6 at 2].

In support of a finding of control with regard to these state agencies' documents, Meta argues primarily that Delaware agencies are proscriptively barred from obtaining counsel other than the Delaware Attorney General, without consent from the Delaware Attorney General and the Governor of Delaware. *Id.* at 3 (citations omitted). Here, Meta seeks discovery from the following agencies: Department of Education; Department of Health and Human Services; Department of Services for Children, Youth and Families; Office of Management and Budget; and Office of the Governor. *Id.*

After considering the factors argued in the briefs, the Court finds that the factors weigh in favor of a finding that the Delaware Attorney General has legal control, for purposes of discovery, over the Delaware agencies in dispute. The Court finds that mandatory representation by the Delaware Attorney General, subject to consent of the Delaware Attorney General and Governor of Delaware, weighs heavily towards a finding of legal control.

The Delaware Attorney General heavily relies on a statutory argument based on Title 29, § 250(b) of the Delaware Code, which states:

The Attorney General shall have the right of access at all times to the books, papers, records and other documents of any officer, department, board, agency, instrumentality or commission of the state government. The Attorney General shall not have this right of access for purposes of discovery in any civil actions brought by or on the relation of the Attorney General other than for the books, papers, records, and documents of the Department of Justice.

The Delaware Attorney General argues that the second sentence should be interpreted to

1 prohibit the Delaware Attorney General any possible right to access the documents of any state
2 agencies “for purposes of discovery” in any action filed by the Attorney General. [Dkt. 738-6 at 2].
3 The Delaware Attorney General’s interpretation of the statute is contrary to the express language of
4 the statute cited. The first sentence of Section 2508(b) gives the Attorney General a broad right to
5 access the documents of state agencies on demand. The second sentence of Section 2508(b) says
6 that “[t]he Attorney General shall not have this right of access” to the documents. The intent of the
7 statute is thus clear – in investigations, in defense of civil action, and in criminal actions, the
8 Delaware Attorney General has a broad right to access state agency documents. In civil actions
9 initiated by the Delaware Attorney General, the statute simply provides that the Delaware Attorney
10 General cannot rely on this statute as a substitute for discovery in that action. However, contrary to
11 the Delaware Attorney General’s argument, this statute does not take away every or any other right
12 the Attorney General may have to access the documents of state agencies. At best, the second
13 sentence of Section 2508(b) puts the Delaware Attorney General in the same position as most (if
14 not all) of the other state Attorneys General with regard to control – there being no express statutory
15 right to access documents, the Court examines whether other sources of law provide that right. The
16 second sentence of Section 2508(b) indicates a legislative intent to require the Attorney General to
17 use other available avenues to obtain documents from state agencies in connection with civil
18 litigation, and an intent to disallow the Attorney General to use this statute as an end-around normal
19 discovery procedures. This statute does not prohibit or forbid the Delaware Attorney General from
20 seeking agency documents using any such other available or normal processes.

21 The Delaware Attorney General further argues that this statute “is thus consistent with the
22 general rule in Delaware that ‘attorneys do not exercise control over their clients’ property.’” Dkt.
23 738-6 at 2 (citing *Sokol Holdings, Inc. v. Dorsey & Whitney, LLP*, No. CIV.A. 3874-VCS, 2009 WL
24 2501542, at *4 (Del. Ch. Aug. 5, 2009)). First, the decision by the Delaware Attorney General to
25 cite *Sokol* is unusual because that case involved a motion to transfer jurisdiction from the Chancery
26 court to Colorado Superior Court. In so holding, the Delaware court stated that “[t]his case has no
27 relevant connection to Delaware, and Delaware law has no bearing on it.” *Sokol*, 2009 WL 2501542,
28 at *5. Accordingly, the Delaware Attorney General’s argument that *Sokol* demonstrates a “general

1 rule in Delaware” is undercut by the very case they cite, and the Court does not credit the argument
2 for that reason alone.

3 Second, the excerpt from *Sokol* quoted by the Delaware Attorney General has no bearing on
4 control for purposes of discovery. *Sokol* involved a dispute between a law firm and a former client
5 over alleged overbilling of fees and alleged breach of fiduciary duty, and the parties there disputed
6 whether subject matter jurisdiction was proper in Chancery Court or in a Superior Court which can
7 hear professional negligence (i.e., legal) claims. The statement quoted from *Sokol* by the Delaware
8 Attorney General in this Court is a passage distinguishing the scope of the attorney-client
9 relationship from the scope of a fiduciary duty of a trustee when they control property of another as
10 a fiduciary. *Id.* at *4. The *Sokol* opinion’s statement, viewed in proper context, indicates that
11 attorneys do not control under the rules governing fiduciary duties the property of a client. And
12 *Sokol* recognized that there can, in fact, be “circumstances in which an attorney exercises control
13 over the property of a client.” *Id.*

14 Further, the Court notes that *Sokol*’s analysis is consistent with this Court’s analysis of the
15 close relationship between attorneys and clients regarding control for purposes of discovery
16 discussed above. The *Sokol* opinion states that “attorneys simply hold positions of heightened trust
17 . . . which requires the attorney to meet certain professional standards.” *Id.*

18 Facially, this statute makes no mention of attorney controlling client property and thus does
19 not support the Delaware Attorney General’s argument. More importantly, this argument
20 erroneously confuses property ownership concepts with control for purposes of discovery. In *In*
21 *Synopsys*, Judge Chen found control where “the word control does not require that the party have
22 legal ownership or actual physical possession of the documents at issue.” *Synopsys*, 2006 WL
23 1867529, at *2 (citation and internal quotations omitted). Indeed, “while courts have cautioned that
24 “[l]egal ownership is not determinative of whether a party has . . . control of a document for the
25 purposes of Rule 34 the court takes this to mean: if the third-party has ‘legal ownership’ of the
26 document, the inquiry as to control does not end there. Conversely, if a party does have legal
27 ownership, as here, the court finds a strong indication that defendants possess the very definition of
28 ‘control’ over these documents.” *Ice Corp. v. Hamilton Sundstrand Corp.*, 245 F.R.D. 513, 521 (D.

1 Kan. 2007) (internal quotations omitted); *see also* 7 Moore’s Federal Practice – Civil § 34.14
2 (“Legal restrictions that may limit a party’s ability to obtain certain documents or to disclose them
3 to others will not necessarily preclude a finding that the party has possession, custody, or control
4 over those documents.”).

5 The Delaware Attorney General relies on not only *Sokol* and other Delaware state caselaw
6 to argue lack of control. [Dkt. 738-6 at 2]. The Delaware Attorney General cites *Deephaven Risk*
7 *Arb Trading Ltd. v. UnitedGlobalCom, Inc.*, No. CIV.A. 379-N, 2005 WL 1713067, at *11 (Del.
8 Ch. July 13, 2005), for the proposition that the “key inquiry” for control “is whether they have “the
9 power, unaided by the courts, to force production of the documents.” First, *Deephaven* is an
10 unpublished Chancery Court opinion applying Delaware’s statutory scheme under Section 220 of
11 Title 8 of the Delaware Code, for a shareholder to inspect the records kept by a Delaware corporation
12 as a fiduciary for its shareholders, which is a far cry from Rule 34. *Id.* As discussed above, control
13 of property by someone acting under a fiduciary duty is not the same legal standard for control of
14 documents under Rule 34, and to the extent the Delaware Attorney General asserts otherwise, that
15 argument is legally erroneous. Second, the Delaware Attorney General also argues here that its
16 argument based on *Deephaven* is supported by another state law case, *Weinstein Enterprises, Inc.*
17 *v. Orloff*, 870 A.2d 499, 510 (Del. 2005). [Dkt. 738-6 at 2]. That case is not helpful or germane to
18 the issues here. *Weinstein*, like *Deephaven*, concerned inspection of documents controlled by a
19 subsidiary corporation, and the *Weinstein* opinion makes clear that the analysis under Delaware’s
20 Section 220 requires two different types of specific control, the first being the “fiduciary” control
21 discussed above, and the second being “actual control” to control operations of a subsidiary
22 organization to force that entity to provide its financial documents for inspection. *Weinstein*, 870
23 A.2d at 511–12. The discussion in *Weinstein* regarding whether court enforcement of a duty to open
24 documents up for corporate inspection is specifically based on the text of Section 200, and
25 jurisprudence under that state law. *Id.* The cited passage from *Weinstein* nowhere uses the phrase
26 “key inquiry” and nowhere equates Section 220 with Rule 34. Fundamentally, the Court finds the
27 Delaware Attorney General’s arguments based on Section 220 and Delaware Chancery Court
28 precedent to be legally irrelevant. Indeed, the Court has serious concerns about the manner in which

1 the control issue was presented and briefed by several of the state Attorneys General, including the
2 Delaware Attorney General, given how attenuated these state law arguments are from the law under
3 Rule 34.

4 To be clear, the Court rejects the argument that a “key inquiry” under Rule 34 is whether the
5 party involved has “the power, unaided by the courts, to force production of the documents.” Indeed,
6 the issue of control under Rule 34 only requires determining if there is a “legal right” to access or
7 obtain the documents upon demand. Often, a party with a “legal right” must, in fact, use the court
8 system to enforce and validate that right. Nothing in the text of Rule 34 or the Federal Rules of
9 Civil Procedure state, much less imply, that control is to be construed as a discretionary, extra-
10 judicial exercise of “power” (unlike the Delaware statute and case law relied upon heavily by the
11 Delaware Attorney General here). To the contrary, the Federal Rules contemplate and provide
12 measures for parties to seek judicial relief when confronted with a party refusing to produce
13 documents in discovery. *See, e.g.*, Fed. R. Civ. P. 37. Further, the scheme for discovery under the
14 Federal Rules contemplate that, in appropriate circumstances, not only can judicial relief for
15 discovery be sought, but also the courts have the authority to sanction parties (and third parties) for
16 failure to obey a discovery order, among other conduct. Fed. R. Civ. P. 37(b)-(f). A simple review
17 of the Federal Rules demonstrates the inapplicability of Delaware’s statutory scheme as analogous
18 for purposes of this dispute.

19 Further, as discussed in the Legal Standards section above, the inquiry regarding control for
20 purposes of Rule 34 discovery is a federal question, governed by the Federal Rules of Civil
21 Procedure. As discussed above, even if the Delaware Attorney General’s interpretation of Section
22 2508 were correct, that state statute can not preempt federal law, and Delaware’s Section 220, and
23 related case law, are not persuasive in evaluating the control issue under Rule 34, because that
24 statutory scheme is so different from Rule 34. Even though detailed consideration of the specific
25 factors under a comity analysis are not applicable in this case given the Supremacy Clause of the
26 U.S. Constitution, the Court has analyzed the cited state law statutes and cases for completeness.
27 *Cf., e.g., In re Vivendi Universal, S.A. Sec. Litig.*, No. 02CIV5571RJHHBP, 2006 WL 3378115, at
28 *2–4 (S.D.N.Y. Nov. 16, 2006) (holding that international comity did not support allowing French

1 “blocking statute” to prohibit discovery proceeding under Federal Rules of Civil Procedure 34 and
2 45). The Court’s extensive review of the cited Delaware statute and case law, summarized herein,
3 demonstrates that the Delaware Attorney General’s arguments here are, at best, incorrect as a matter
4 of law, and, at worst, risk raising questions as to counsel’s judgment and credibility.

5 Because Section 2508 does not operate to foreclose a finding of control under Rule 34, as
6 discussed above, the Court next turns to analyzing the issue of control with regard to other factors.
7 Importantly, the Delaware Attorney General’s arguments do not negate the fact that all but of the
8 Delaware agencies at issue here are barred by Delaware law from obtaining counsel other than the
9 Attorney General, absent consent from the Attorney General. Del. Code. § 2507. Indeed, the
10 Delaware Attorney General confirmed that its office could represent all of the Delaware agencies at
11 issue, if Meta were to serve those agencies with a subpoena in this matter. [Dkt. 738-1 at 8]. As
12 noted above, the Delaware Attorney General has had months to confer with the agencies about
13 whether they would seek consent to obtain different counsel. To date, no such other counsel has
14 entered appearance for the Delaware state agencies, and the Delaware Attorney General has not
15 indicated that it has provided any consents to any of the agencies. Under Delaware’s statutory
16 scheme,

17 the Attorney General shall have the following powers, duties and
18 authority: . . . to provide legal advice, counsel and services for
19 administrative offices, agencies, departments, boards, commissions
20 and officers of the state government concerning any matter arising in
21 connection with the exercising of their official powers or duties . . . ,
22 to represent as counsel in all proceedings or actions which may be
23 brought on behalf of or against them in their official capacity in any
24 court, except in actions in which the State has a conflicting interest,
25 all officers, agencies, departments, boards, commissions and
26 instrumentalities of state government.

27 Del. Code. § 2504(3) (emphasis added).

28 Accordingly, based on the record presented to the Court, under the Delaware statutory
scheme each agency at issue here will be represented by the Delaware Attorney General in this
matter for discovery. *See* Del. Code §§ 2503, 2507. Thus, as a matter of the efficient and rational
administration of justice in this case, because the Delaware Attorney General will be involved in
representing these state agencies in any event in this case (whether to respond to subpoenas or to

1 respond to party discovery), the Court in its discretion determines that a finding of control is further
2 supported by the simple and pragmatic realities involved in these circumstances.

3 Relatedly, the Delaware Attorney General has taken the position that communications
4 between the Delaware Attorney General's office and these state agencies would be covered by the
5 attorney-client privilege. [Dkt. 738-6 at 2]. To the extent the Delaware Attorney General has
6 attempted to subdivide its own office between Delaware Attorney General's attorneys in the Fraud
7 and Consumer Division (litigating this case to date) and other attorneys in the Delaware Attorney
8 General's Civil Division (who alleged "are responsible for providing legal advice and representation
9 to the Delaware State Agencies"), *see id.*, in order to somehow argue that the scope of attorney-
10 client privilege is limited only as to some parts of the state Attorney General's office but not other
11 "divisions" of that same organization, that argument is not supported by citation to any law and is
12 contrary to the weight of law. The scope of attorney-client relationship (and the duties flowing
13 therefrom, including the scope of the attendant attorney-client privilege) encompasses the entirety
14 of a legal services organization due to well-known rules of imputation of confidences to a legal
15 services organization, including a public law office. *See, e.g., People ex rel. Peters*, 951 P.2d at 930
16 ("When an attorney associates with a law firm, the principle of loyalty to the client extends beyond
17 the individual attorney and applies with equal force to the other attorneys practicing in the firm. This
18 principle, known as the 'rule of imputed disqualification,' . . . requires disqualification of all
19 members of a law firm when any one of them practicing alone would be disqualified because of a
20 conflict of interest The rule of imputed disqualification applies to both private firms and public
21 law firms such as a district attorney's office or the office of the state public defender."); *accord City*
22 *of Cnty. of Denver*, 37 P.3d at 457; *see also Kirk*, 108 Cal. Rptr. 3d at 637–38, 642 ("We do not
23 doubt that vicarious disqualification is the general rule, and that we should presume knowledge is
24 imputed to all members of a tainted attorney's law firm. However, we conclude that, in proper
25 circumstances, the presumption is a rebuttable one[.]" The court recognizing presumption of
26 imputed knowledge in the context of government attorneys, which presumption could be rebutted
27 by proper ethical screening); *cf. also Billings*, 441 S.E.2d at 266 (because individual government
28 lawyer at issue "should be screened from any direct or indirect participation in the matter," vicarious

disqualification of entire office denied); *cf. also Calhoun*, 492 S.W.3d at 137 (individual lawyer disqualified when joining prosecutors’ office but “the entire office in which that attorney works is not disqualified as long as the disqualified attorney is appropriately screened. Disqualification of the entire prosecuting office is not necessary absent special facts, such as a showing of actual prejudice; or, perhaps the screening procedures are ineffective.”). Some jurisdictions treat public legal service organizations like private law firms and impute shared confidences among lawyers of the entire public law entity. Even in jurisdictions which do not automatically impute disqualification, and shared confidences, to an entire public law office, those courts recognize that ethical screening or other procedures are required out of recognition that actual (as opposed to imputed) sharing of confidences may occur and such procedures are required to avoid dissemination of attorney-client privileged communications within an entire public law organization. This review of case law demonstrates that no courts support the Delaware Attorney General’s argument that different individual lawyers in the Delaware Attorney General’s office have *ex ante* separable, discrete attorney-client relationships.

The Court rejects the Delaware Attorney General’s attempt to simultaneously disclaim the existence of an attorney-client privilege as between the “team” of attorneys currently working on this case, while apparently attempting to preserve the ability to assert that the privilege applies to communications between other lawyers in the Georgia Attorney General’s Office and these agencies. “[T]o the extent that [the State] asserts an attorney-client privilege with these legislators, it does so solely in their official capacities [I]t is inconsistent for the State to argue that on one hand the [State] Attorney General represents these individuals, but that for discovery purposes the [Plaintiff] United States must resort to Federal Rule of Civil Procedure 45.” *Perez*, 2014 WL 1796661, at *2. To the extent the Georgia Attorney General is asserting that the attorney-client privilege applies to communications between the Georgia Attorney General’s office and the agencies at issue, that further supports the conclusion of control here. Assertion of the attorney-client privilege requires, as a prerequisite, the existence of an attorney-client relationship. *See Graf*, 610 F.3d at 1156.

In addition, there is no citation to any statutory or legal prohibition on the Delaware Attorney

General's representing the state agencies in this matter for purposes of discovery. The Court recognizes that this is a somewhat unusual situation, in which a law enforcement organization, the attorney general, is both a party to the case while also acting as counsel for a third party. However, this would not be the first time that a legal services provider, as counsel for a party, is found to have control over third party documents for purposes of discovery. *See, e.g., Becnel*, 2018 WL 691649, at *4 ("Both Salas individually and his law firm, the subpoena recipients and defendants in this court, are counsel of record for the Salas defendants in the Florida lawsuit Thus, a Rule 34 request for production to Salas in the Florida lawsuit required Salas to respond as to responsive materials over which Salas and his law firm had possession, custody or control."). Indeed, one court has noted that "[i]n general, an attorney is presumed to have control over documents in its client's possession." *Perez*, 2014 WL 1796661, at *2. The Court is not holding broadly that there must be a finding of a legal right of access to and thus control over third party client documents in every case involving a legal services provider as a party; rather, under the particular facts here, and under the totality of circumstances viewed in light of applicable legal standards, the Court finds that control exists here.

VI. FLORIDA

In opposition to the control issue, the Florida Attorney General argues primarily the following factors: (1) Florida law prevents the Florida Attorney General from accessing documents held by Florida agencies; (2) the Florida Attorney General is a separate entity and independent from the Florida agencies; (3) the Florida Attorney General brought the lawsuit under its own independent law enforcement capacity; and (4) Florida agencies are statutorily responsible for maintaining, preserving, retaining, and providing access to its own records. [Dkt. 738-7 at 2].

In support of a finding of control with regard to these state agencies' documents, Meta argues based primarily on the following factors: (1) Florida agencies are proscriptively barred from obtaining counsel other than the Florida Attorney General, with certain legal exceptions; and (2) the Florida laws, which purportedly prevents the Florida Attorney General from accessing documents held by Florida agencies, are "wholly unrelated to the discovery at issue[.]" *Id.* at 3. Here, Meta seeks discovery from the following agencies: Commerce; Department of Agriculture and Consumer

1 Services; Department of Children and Families; Department of Education; Department of Health;
2 and Office of the Governor. *Id.*

3 After considering the factors argued in the briefs, the Court finds that the factors weigh in
4 favor of a finding that the Florida Attorney General does have legal control, for purposes of
5 discovery, over the certain listed Florida agencies. While the Florida Attorney General is a separate
6 entity and while the Florida Attorney General does bring the instant action in its own independent
7 authority, this does not outweigh the requirement that the Florida Attorney General must statutorily
8 act as the Florida agencies' counsel.

9 Under Florida's statutory scheme, the Florida Attorney general "[s]hall appear in and attend
10 to, in behalf of the state, all suits or prosecutions, civil or criminal or in equity, in which the state
11 may be a party, or in anywise interested, in the Supreme Court and district courts of appeal of this
12 state." Fla. Stat. § 16.01(4). Additionally, the Florida Attorney General "[s]hall appear in and attend
13 to such suits or prosecutions in any other of the courts of this state or in any courts of any other state
14 or of the United States." Fla. Stat. § 16.01(5). Moreover, "[t]he Department of Legal Affairs shall
15 be responsible for providing all legal services required by any department, unless otherwise
16 provided by law. However, the Attorney General may authorize other counsel where emergency
17 circumstances exist and shall authorize other counsel when professional conflict of interest is
18 present." Fla. Stat. § 16.015.

19 Curiously, the Florida Attorney General takes the position that it would not represent the
20 listed agencies. [Dkt. 738-1 at 9]. However, on the record before the Court, this is an error of law
21 because neither of these agencies are exempt from the express prohibition on retaining different
22 counsel. Accordingly, it appears undisputed that under the Florida statutory scheme each state
23 agency at issue here will be represented by the Florida Attorney General in this matter for discovery.
24 *See* Fla. Stat. § 16.01(4). Thus, because the Florida Attorney General appears likely to be involved
25 in representing these state agencies in any event in this case, whether to respond to subpoenas or to
26 respond to party discovery.

27 Relatedly, the Florida Attorney General has not disclaimed whether it will assert that
28 communications between the Florida Attorney General and these state agencies are covered by the

1 attorney-client privilege. [Dkt. 738-7 at 2]. The Florida Attorney General’s argument that “in
2 Florida, the privilege is not waived by communicating work product or attorney-client privileged
3 material to another state agency” is circular. *Id.* If there is an attorney client relationship between
4 the Florida Attorney General and these state agencies, then by definition any such communications
5 would not operate as a waiver of privilege because they are inherently privileged to begin with.
6 “[T]o the extent that [the State] asserts an attorney-client privilege with these legislators, it does
7 so solely in their official capacities [I]t is inconsistent for the State to argue that on one hand
8 the [State] Attorney General represents these individuals, but that for discovery purposes the
9 [Plaintiff] United States must resort to Federal Rule of Civil Procedure 45.” *Perez*, 2014 WL
10 1796661, at *2. To the extent the Florida Attorney General is attempting to preserve the ability to
11 assert the attorney-client privilege between the Florida Attorney General’s office and the agencies
12 at issue, that further supports the conclusion of control here. Assertion of the attorney-client
13 privilege requires, as a prerequisite, the existence of an attorney-client relationship. *See Graf*, 610
14 F.3d at 1156.

15 Further, there is no statutory, legal, or administrative rule cited which prohibits the Florida
16 Attorney General from accessing the relevant documents of any of the state agencies at issue. The
17 Florida Attorney General’s argument that two Florida state agencies are required to maintain their
18 own records is unavailing. [Dkt. 738-7 at 2]. Simply having a statute that makes these Florida
19 agencies statutorily responsible for maintaining, preserving, retaining, and providing their own
20 records does not demonstrate that the Florida Attorney General lacks access to those documents.
21 First, the statutes cited by the Florida Attorney General relate to records and materials which are
22 outside the scope of and thus not a restriction on the discovery sought in this case. Fla. Stat. §
23 893.055 (the Florida Attorney General’s ability to request records held by the Florida Department
24 of Health); Fla. Stat. § 409.9072 (the Florida Agency for Health Care Administration’s provision of
25 Medicaid-related documents to the Florida Attorney General). Second, the Florida statutes here do
26 not specifically restrict or prohibit the Florida Attorney General’s access to agency records for
27 discovery purposes – rather, as noted they provide mechanisms for the Florida Attorney General to
28 request and gain access to specific documents from those two state agencies in certain

1 circumstances. The general statutory responsibility of Florida agencies to manage their own records
2 does not negate the Florida Attorney General's role as counsel for those agencies, which inherently
3 involves obtaining necessary documents for effective representation in litigation. Therefore,
4 because these statutes do not prohibit the Florida Attorney General's access to the state agencies'
5 materials relevant in this matter for discovery, the Court finds that the Florida Attorney General has
6 a legal right to access and thus control of the relevant records of the agencies listed by Meta.

7 In addition, there is no citation to any statutory or legal prohibition on the Florida Attorney
8 General's representing the state agencies in this matter for purposes of discovery. The Court
9 recognizes that this is a somewhat unusual situation, in which a law enforcement organization, the
10 attorney general, is both a party to the case while also acting as counsel for a third party. However,
11 this would not be the first time that a legal services provider, as counsel for a party, is found to have
12 control over third party documents for purposes of discovery. *See, e.g., Becnel*, 2018 WL 691649,
13 at *4 ("Both Salas individually and his law firm, the subpoena recipients and defendants in this
14 court, are counsel of record for the Salas defendants in the Florida lawsuit Thus, a Rule 34
15 request for production to Salas in the Florida lawsuit required Salas to respond as to responsive
16 materials over which Salas and his law firm had possession, custody or control."). Indeed, one court
17 has noted that "[i]n general, an attorney is presumed to have control over documents in its client's
18 possession." *Perez*, 2014 WL 1796661, at *2. The Court is not holding broadly that there must be
19 a finding of a legal right of access to and thus control over third party client documents in every
20 case involving a legal services provider as a party; rather, under the particular facts here, and under
21 the totality of circumstances viewed in light of applicable legal standards, the Court finds that
22 control exists here.

23 The Florida Attorney General's role as counsel for the agencies at issue inherently involves
24 obtaining necessary documents for effective representation in litigation. In acting as counsel, the
25 Florida Attorney General would necessarily have access to and thus control over the relevant
26 documents needed to respond to discovery requests. *See Monsanto*, 2023 WL 4083934, at *5–6
27 (finding state Attorney General has control over agency documents "based on his broad statutory
28 and common law powers to control and manage legal affairs on behalf of state agencies, has a legal

right to obtain responsive documents from the state agencies referenced in the Complaint”). To the extent the Florida Attorney General argues that the state agencies are “independent” of the Florida Attorney General, are “not under the supervision nor control” of the Florida Attorney General, and that under the Florida Constitution the Attorney General is an “independent, elected official,” *see* dkt. 738-7 at 2, these arguments misapprehend the “legal control” test for documents – the issue is not simply whether the two entities are legally separate (such as two different and separately incorporated entities or legally established entities), but rather whether there is a legal right to obtain the documents as explained by *Citric Acid*. “The control analysis for Rule 34 purposes does not require the party to have actual managerial power over the foreign corporation, but rather that there be close coordination between them.” *St. Jude Medical S.C., Inc.*, 305 F.R.D. at 638. Here, the attorney-client relationship between the state Attorney General and the state agencies (a relationship mandated by state law) necessitates close coordination. While operational control may be a factual situation which demonstrates a legal right to obtain the documents, the absence of such “executive or functional control” is not determinative for evaluating “control” for purposes of discovery. By definition, the “legal control” issue for discovery arises when there are two legally distinct or separate entities – otherwise, if only one entity were involved, there would be no dispute that party discovery covered that one entity. As discussed above, courts have found “control” for purposes of discovery where a party is clearly not in managerial control over the third-party, such as a subsidiary having control over the documents of a parent corporation, or an individual government officer having control over the documents of an entire agency. Thus, arguing that “[n]one of them [the state agencies] are related to” the Florida Attorney General and that they “operate outside of the Florida [Attorney General Office’s] authority,” is merely a restatement of the issue and not determinative of the issue. [Dkt. 738-7 at 2]. Arguing that the “decision to pursue this enforcement action was at the discretion of the Florida [Attorney General Office] and made independently of the state agencies,” confuses and conflates the “legal control” issue for discovery with “operational control” or “daily functional independence” and thus constitutes a legally erroneous argument. *Id.*

Indeed, at least one other federal court has previously found that the Florida Attorney General has control over Florida state agency materials under Fed. R. Civ. P. 34 and “they are

1 therefore subject to party discovery.” *Freyre v. Hillsborough Cnty. Sheriff’s Off.*, No.
2 813CV02873T27TBM, 2016 WL 1029512, at *2 (M.D. Fla. Mar. 9, 2016), *vacated*, No.
3 813CV02873T27TBM, 2016 WL 4502463 (M.D. Fla. July 6, 2016) (citations omitted) (The Court
4 later vacated the order as a part of the parties’ settlement. *Freyre*, 2016 WL 4502463, at *1).

5 The Florida Attorney General argues that the *Freyre* was vacated and thus should be
6 disregarded. [Dkt. 738-7 at 2]. The *Freyre* opinion is not binding precedent, and the fact that *Freyre*
7 was vacated in connection with a settlement impacts the rights of the parties to that case. But nothing
8 in the vacatur of that opinion requires this Court to blind itself to whatever persuasive effect flows
9 from that Florida Federal Court’s analysis. While this Court reaches its own independent
10 conclusions consistent with the applicable legal standards discussed above, the analysis by the
11 Florida Federal Court is certainly consistent with (and to that extent further supports) the analysis
12 here with regard to the Florida Attorney General having control with regard to documents of the
13 state agencies at issue.

14 Finally, the Court has recognized that the issue of control of state agency documents, when
15 a State or State Attorney General is a party, has been litigated and decided in a previous Multi-
16 District Litigation involving most of the same States and State Attorneys General as are involved in
17 this case. *Generic Pharmaceuticals (II)*, 699 F. Supp. 3d at 357–58. The *Generic Pharmaceuticals*
18 *(II)* opinion not only ruled against the objecting States, but also helpfully identified numerous States
19 which withdrew their objections to party discovery and negotiated a resolution of this issue with the
20 opposing party there. *Id.* at 356 n.5. In that case, Florida is identified as one of the States which
21 reached agreement on the state agency control issue without requiring that court to expend resources
22 resolving the dispute there. *Id.* Given that the *Generic Pharmaceuticals (II)* opinion resolved the
23 control issue against all the remaining objecting states and given that Florida was able to reach a
24 negotiated resolution of the dispute in that Multi-District Litigation, this Court is disappointed that
25 the Florida Attorney General and Meta here were unable to reach a negotiated resolution of this
26 dispute. As the Court has repeatedly encouraged the Parties at multiple Discovery Management
27 Conferences, they should make every effort to work out discovery disputes through reasonable,
28 good faith negotiations between able and experienced counsel, particularly where, as here, there is

guidance in precedent on the discovery issue at hand.

VII. GEORGIA

In opposition to the control issue, the Georgia Attorney General argues primarily the following factors: (1) the Georgia Attorney General must utilize public channels to compel an agency to produce document; (2) the Georgia Attorney General is a separate entity and independent from the Georgia agencies; and (3) the Georgia Attorney General brought the lawsuit under its own independent law enforcement capacity. [Dkt. 738-8 at 2].

In support of a finding of control with regard to these state agencies' documents, Meta argues based primarily on the following factors: (1) Georgia agencies are proscriptively barred from obtaining counsel other than the Georgia Attorney General, with limited exceptions; and (2) the Georgia Attorney General's purported required use of public channels to compel an agency to produce documents is limited for circumstance which require the records be produced for public inspection. *Id.* at 3. Here, Meta seeks discovery from the following agencies: Board of Regents; Department of Behavioral Health and Developmental Disabilities; Department of Economic Development; Department of Education; Department of Family and Children Services; Department of Human Services; Department of Public Health; Governor's Office; and Office of the Child Advocate. *Id.*

After considering the factors argued in the briefs, the Court finds that the factors weigh in favor of a finding that the Georgia Attorney General does have legal control, for purposes of discovery, over the listed Georgia agencies. While the Georgia Attorney General is a separate entity and while the Georgia Attorney General does bring the instant action in its own independent authority, this does not outweigh the requirement that the Georgia Attorney General must statutorily act as the Georgia agencies' counsel.

Under Georgia's statutory scheme, the Georgia Attorney General has the duty to "represent the state in all civil actions tried in any court[.]" Ga. Code § 45-15-3(6). Additionally, the Georgia Attorney General's department "is vested with complete and exclusive authority and jurisdiction in all matters of law relating to the executive branch of the government and every department, office, institution, commission, committee, board, and other agency thereof. Every department, office,

1 institution, commission, committee, board, and other agency of the state government is prohibited
2 from employing counsel in any manner whatsoever unless otherwise specifically authorized by
3 law.” Ga. Code § 45-15-34.

4 Indeed, the Georgia Attorney General confirmed that its office could represent all of the
5 Georgia agencies at issue if Meta were to serve those agencies with a subpoena in this matter. [Dkt.
6 738-1 at 9–10]. The Court notes that the State Attorneys General have filed an Administrative
7 Motion to file supplemental information that Meta has recently served an intent to issue subpoenas
8 to various state agencies, including the Georgia Department of Behavioral Health and
9 Developmental Disabilities and the Georgia Department of Education. [Dkt. 1031-4 at 17-101].
10 Neither of these state agencies are allowed to employ legal counsel other than the Georgia Attorney
11 General absent circumstances not at issue here. Ga. Code §§ 45-15-3, -14, -34. Accordingly, it
12 appears that under the statutory scheme each will be represented by the Georgia Attorney General
13 in this matter for discovery. Thus, because the Georgia Attorney General appears likely to be
14 involved in representing these state agencies in any event in this case, whether to respond to
15 subpoenas or to respond to party discovery.

16 Further, the Georgia Attorney General has taken the position that communications between
17 the Georgia Attorney General and these state agencies would be covered by the attorney-client
18 privilege, and that communications between the specific prosecution team in this case and the state
19 agencies would be covered by the work product doctrine (but apparently not the attorney-client
20 privilege). [Dkt. 738-8 at 2]. To the extent the Georgia Attorney General has attempted to subdivide
21 its own office between the prosecution team in this case and other divisions of the state Attorney
22 General in order to somehow argue that the scope of attorney-client privilege is limited only as to
23 some parts of the state Attorney General’s office but not other sub-teams (such as the Consumer
24 Protection Division which is the prosecuting team for this action), that argument is not supported
25 by citation to law and is contrary to the weight of law. The scope of attorney-client relationship
26 (and the duties flowing therefrom, including the scope of the attendant attorney-client privilege)
27 encompasses the entirety of a legal services organization due to well-known rules of imputation of
28 confidences to a legal services organization, including a public law office. *See, e.g., People ex rel.*

Peters, 951 P.2d at 930 (“When an attorney associates with a law firm, the principle of loyalty to the client extends beyond the individual attorney and applies with equal force to the other attorneys practicing in the firm. This principle, known as the ‘rule of imputed disqualification,’ . . . requires disqualification of all members of a law firm when any one of them practicing alone would be disqualified because of a conflict of interest The rule of imputed disqualification applies to both private firms and public law firms such as a district attorney’s office or the office of the state public defender.”); accord *City of Cnty. of Denver*, 37 P.3d at 457; see also *Kirk*, 108 Cal. Rptr. 3d at 637–38, 642 (“We do not doubt that vicarious disqualification is the general rule, and that we should presume knowledge is imputed to all members of a tainted attorney’s law firm. However, we conclude that, in proper circumstances, the presumption is a rebuttable one[.]” The court recognizing presumption of imputed knowledge in the context of government attorneys, which presumption could be rebutted by proper ethical screening); cf. also *Billings*, 441 S.E.2d at 266 (because individual government lawyer at issue “should be screened from any direct or indirect participation in the matter,” vicarious disqualification of entire office denied); cf. also *Calhoun*, 492 S.W.3d at 137 (individual lawyer disqualified when joining prosecutors’ office but “the entire office in which that attorney works is not disqualified as long as the disqualified attorney is appropriately screened. Disqualification of the entire prosecuting office is not necessary absent special facts, such as a showing of actual prejudice; or, perhaps the screening procedures are ineffective.”). Some jurisdictions treat public legal service organizations like private law firms and impute shared confidences among lawyers of the entire public law entity. Even in jurisdictions which do not automatically impute disqualification, and shared confidences, to an entire public law office, those courts recognize that ethical screening or other procedures are required out of recognition that actual (as opposed to imputed) sharing of confidences may occur and such procedures are required to avoid dissemination of attorney-client privileged communications within an entire public law organization. This review of case law demonstrates that no courts support the Georgia Attorney General’s argument that different individual lawyers in the Georgia Attorney General’s office have *ex ante* separable, discrete attorney-client relationships.

The Court rejects the Georgia Attorney General’s attempt to simultaneously disclaim the

1 existence of an attorney-client privilege as between the “team” of attorneys currently working on
2 this case, while apparently attempting to preserve the ability to assert that the privilege applies to
3 communications between other lawyers in the Georgia Attorney General’s Office and these
4 agencies. “[T]o the extent that [the State] asserts an attorney-client privilege with these
5 legislators, it does so solely in their official capacities [I]t is inconsistent for the State to argue
6 that on one hand the [State] Attorney General represents these individuals, but that for discovery
7 purposes the [Plaintiff] United States must resort to Federal Rule of Civil Procedure 45.” *Perez*,
8 2014 WL 1796661, at *2. To the extent the Georgia Attorney General is asserting that the attorney-
9 client privilege applies to communications between the Georgia Attorney General’s office and the
10 agencies at issue, that further supports the conclusion of control here. Assertion of the attorney-
11 client privilege requires, as a prerequisite, the existence of an attorney-client relationship. *See Graf*,
12 610 F.3d at 1156.

13 Further, there is no statutory, legal, or administrative rule cited which prohibits the Georgia
14 Attorney General from accessing the relevant documents of any of the state agencies at issue. The
15 Georgia Attorney General’s argument that the Georgia Attorney General must use public channels
16 to obtain documents from state agencies is not a credible interpretation of the statute relied upon –
17 there is no citation that a public records request is the only way for the Georgia Attorney General to
18 get documents from state agencies. [Dkt. 738-8 at 2]. If the Georgia Attorney General were correct,
19 then the Georgia Attorney General would have to submit an Open Records Act request even when
20 representing a state agency, to get documents from its own client – which is not merely impractical
21 but also contrary to the principles of effective legal representation. As counsel, the Georgia Attorney
22 General will have the normal type of direct access to the necessary documents from its own clients,
23 without resorting to public channels, ensuring efficient and comprehensive legal support for the
24 agencies involved. The Georgia Open Records Act is not an impediment to that access, because
25 that Act only applies to records which are to be produced for public inspection (and not for purposes
26 of litigation such as this case in which there is a Protective Order limiting public availability of
27 confidential documents). *Bowers v. Bd. of Regents of the Univ. Sys. of Georgia*, 378 S.E.2d 460,
28 460 (Ga. 1989). Further, there is no citation to any statutory or legal prohibition on the Georgia

1 Attorney General’s representing the state agencies in this matter for purposes of discovery. The
 2 Court recognizes that this is a somewhat unusual situation, in which a law enforcement organization,
 3 the attorney general, is both a party to the case while also acting as counsel for a third party.
 4 However, this would not be the first time that a legal services provider, as counsel for a party, is
 5 found to have control over third party documents for purposes of discovery. *See, e.g., Becnel*, 2018
 6 WL 691649, at *4 (“Both Salas individually and his law firm, the subpoena recipients and
 7 defendants in this court, are counsel of record for the Salas defendants in the Florida lawsuit
 8 Thus, a Rule 34 request for production to Salas in the Florida lawsuit required Salas to respond as
 9 to responsive materials over which Salas and his law firm had possession, custody or control.”).
 10 Indeed, one court has noted that “[i]n general, an attorney is presumed to have control over
 11 documents in its client’s possession.” *Perez*, 2014 WL 1796661, at *2. The Court is not holding
 12 broadly that there must be a finding of a legal right of access to and thus control over third party
 13 client documents in every case involving a legal services provider as a party; rather, under the
 14 particular facts here, and under the totality of circumstances viewed in light of applicable legal
 15 standards, the Court finds that control exists here.

16 The Georgia Attorney General’s role as counsel for the agencies at issue inherently involves
 17 obtaining necessary documents for effective representation in litigation. In acting as counsel, the
 18 Georgia Attorney General would necessarily have access to and thus control over the relevant
 19 documents needed to respond to discovery requests. *See Monsanto*, 2023 WL 4083934, at *5–6
 20 (finding state Attorney General has control over agency documents “based on his broad statutory
 21 and common law powers to control and manage legal affairs on behalf of state agencies, has a legal
 22 right to obtain responsive documents from the state agencies referenced in the Complaint”). To the
 23 extent the Georgia Attorney General argues that “various constitutionally created state officials
 24 whom Georgia residents separately elect and endow with distinct responsibilities” and that the
 25 Georgia Attorney General and the head of the Department of Education “are constitutional officers
 26 and separately elected in statewide elections,” *see* dkt. 738-8 at 2, these arguments misapprehend
 27 the “legal control” test for documents – the issue is not simply whether one entity (or the head of an
 28 entity) is under the day-to-day operational control of the other (such as a parent-wholly-owned-

1 subsidiary relationship), and not simply whether the two entities are legally separate (such as two
2 different and separately incorporated entities or legally established corporations), but rather whether
3 there is a legal right to obtain the documents as explained by *Citric Acid*. ““The control analysis for
4 Rule 34 purposes does not require the party to have actual managerial power over the foreign
5 corporation, but rather that there be close coordination between them.”” *St. Jude Medical S.C., Inc.*,
6 305 F.R.D. at 638. Here, the attorney-client relationship between the state Attorney General and
7 the state agencies (a relationship mandated by state law) necessitates close coordination. While
8 operational control may be a factual situation which demonstrates a legal right to obtain the
9 documents, the absence of such “executive or functional control” is not determinative for evaluating
10 “control” for purposes of discovery. By definition, the “legal control” issue for discovery arises
11 when there are two legally distinct or separate entities – otherwise, if only one entity were involved,
12 there would be no dispute that party discovery covered that one entity. As discussed above, courts
13 have found “control” for purposes of discovery where a party is clearly not in managerial control
14 over the third-party, such as a subsidiary having control over the documents of a parent corporation,
15 or an individual government officer having control over the documents of an entire agency. Thus,
16 arguing that these “elected officials – including the [Georgia] Governor and the [Georgia Attorney
17 General] – can have different interests and litigate against each other,” is merely a restatement of
18 the issue that there are two entities involved here and not determinative of that issue. *Id.* Arguing
19 that “the [Georgia Attorney General] alone brought this action . . . outside the scope of any agency
20 representation or direction from the [Georgia] Governor,” confuses and conflates the “legal control”
21 issue for discovery with “operational control” or “daily functional independence” and thus
22 constitutes a legally erroneous argument. *Id.*

23 **VIII. HAWAII**

24 In opposition to the control issue, the Hawai’i Attorney General argues primarily the
25 following factors: (1) the Hawai’i Attorney General is a separate entity and independent from the
26 Hawai’i agencies; and (2) the Hawai’i Attorney General brought the lawsuit under its own
27 independent law enforcement capacity. [Dkt. 738-9 at 2].

28 In support of a finding of control with regard to these state agencies’ documents, Meta argues

1 based primarily on the following factors: (1) the Hawai'i Attorney General must act as counsel for
2 the Hawai'i agencies; and (2) Hawai'i has already confirmed that it will represent each of the
3 identified agencies in responding to a Meta subpoena. *Id.* at 3. Here, Meta seeks discovery from
4 the following agencies: Department of Budget and Finance; Department of Business, Economic
5 Development and Tourism; Department of Commerce and Consumer Affairs; Department of
6 Education; Department of Health; Department of Human Services; Governor; and State Council on
7 Mental Health. *Id.*

8 After considering the factors argued in the briefs, the Court finds that the factors weigh in
9 favor of a finding that the Hawai'i Attorney General does have legal control, for purposes of
10 discovery, over the Hawai'i agencies in dispute. While the Hawai'i Attorney General is a separate
11 entity and while the Hawai'i Attorney General does bring the instant action in its own independent
12 authority, this does not outweigh the requirement that the Hawai'i Attorney General must statutorily
13 act as the Hawai'i agencies' counsel.

14 Under Hawai'i's statutory scheme, the Hawai'i Attorney General "shall administer and
15 render state legal services, including furnishing of written legal opinions to the governor, legislature,
16 and such state departments and officers as the governor may direct; represent the State in all civil
17 actions in which the State is a party[.]" Haw. Rev. Stat. § 26-7. Additionally, the Hawai'i Attorney
18 General shall "at all times when called upon, give advice and counsel to the heads of departments,
19 district judges, and other public officers, in all matters connected with their public duties, and
20 otherwise aid and assist them in every way requisite to enable them to perform their duties
21 faithfully." Haw. Rev. Stat. § 28-4.

22 Indeed, the Hawai'i Attorney General confirmed that its office could represent all of the
23 Hawai'i agencies at issue if Meta were to serve those agencies with a subpoena in this matter. [Dkt.
24 738-1 at 9–10]. Indeed, the Hawai'i Attorney General will act as counsel for the Hawai'i agencies
25 if the agencies receive a subpoena from Meta. [Dkt. 738-1 at 10–11]. Accordingly, it appears that
26 under the statutory scheme each will be represented by the Hawai'i Attorney General in this matter
27 for discovery, whether because of any future subpoenas or because the Court finds control for
28 purposes of discovery. *See id.* Thus, because the Hawai'i Attorney General appears likely to be

1 involved in representing these state agencies in any event in this case, whether to respond to
2 subpoenas or to respond to party discovery.

3 Relatedly, the Hawai'i Attorney General has taken the position that all communications
4 between any division of the Hawai'i Attorney General and these state agencies would be covered
5 by the attorney-client privilege. [Dkt. 738-9 at 2]. "[T]o the extent that [the State] asserts an
6 attorney-client privilege with these legislators, it does so solely in their official capacities [I]t
7 is inconsistent for the State to argue that on one hand the [State] Attorney General represents these
8 individuals, but that for discovery purposes the [Plaintiff] United States must resort to Federal Rule
9 of Civil Procedure 45." *Perez*, 2014 WL 1796661, at *2. The fact that the Hawai'i Attorney General
10 is asserting the attorney-client privilege applies to communications between the Hawai'i Attorney
11 General's office and the agencies at issue further supports the conclusion of control here. Assertion
12 of the attorney-client privilege requires, as a prerequisite, the existence of an attorney-client
13 relationship. *See Graf*, 610 F.3d at 1156.

14 Further, there is no statutory, legal, or administrative rule cited which prohibits the Hawai'i
15 Attorney General from accessing the relevant documents of any of the state agencies at issue. The
16 Court recognizes that this is a somewhat unusual situation, in which a law enforcement organization,
17 the attorney general, is both a party to the case while also acting as counsel for a third party.
18 However, this would not be the first time that a legal services provider, as counsel for a party, is
19 found to have control over third party documents for purposes of discovery. *See, e.g., Becnel*, 2018
20 WL 691649, at *4 ("Both Salas individually and his law firm, the subpoena recipients and
21 defendants in this court, are counsel of record for the Salas defendants in the Florida lawsuit
22 Thus, a Rule 34 request for production to Salas in the Florida lawsuit required Salas to respond as
23 to responsive materials over which Salas and his law firm had possession, custody or control.")).
24 Indeed, one court has noted that "[i]n general, an attorney is presumed to have control over
25 documents in its client's possession." *Perez*, 2014 WL 1796661, at *2. The Court is not holding
26 broadly that there must be a finding of a legal right of access to and thus control over third party
27 client documents in every case involving a legal services provider as a party; rather, under the
28 particular facts here, and under the totality of circumstances viewed in light of applicable legal

standards, the Court finds that control exists here.

The Hawai'i Attorney General's role as counsel for the agencies at issue inherently involves obtaining necessary documents for effective representation in litigation. In acting as counsel, the Hawai'i Attorney General would necessarily have access to and thus control over the relevant documents needed to respond to discovery requests. *See Monsanto*, 2023 WL 4083934, at *5–6 (finding state Attorney General has control over agency documents “based on his broad statutory and common law powers to control and manage legal affairs on behalf of state agencies, has a legal right to obtain responsive documents from the state agencies referenced in the Complaint”). To the extent the Hawai'i Attorney General argues that these agencies are “independent” from the state Attorney General and are not supervised by the state Attorney General, *see* dkt. 738-9 at 2, that argument misapprehends the “legal control” test for documents – the issue is not simply whether one entity is under the day-to-day operational control of the other (such as a parent-wholly-owned-subsidiary relationship), and not simply whether the two entities are legally separate (such as two different and separately incorporated entities), but rather whether there is a legal right to obtain the documents as explained by *Citric Acid*. “The control analysis for Rule 34 purposes does not require the party to have actual managerial power over the foreign corporation, but rather that there be close coordination between them.” *St. Jude Medical S.C., Inc.*, 305 F.R.D. at 638. Here, the attorney-client relationship between the state Attorney General and the state agencies (a relationship mandated by state law) necessitates close coordination. While operational control may be a factual situation which demonstrates a legal right to obtain the documents, the absence of such “executive or functional control” is not determinative for evaluating “control” for purposes of discovery. By definition, the “legal control” issue for discovery arises when there are two legally distinct or separate entities – otherwise, if only one entity were involved, there would be no dispute that party discovery covered that one entity. As discussed above, courts have found “control” for purposes of discovery where a party is clearly not in managerial control over the third-party, such as a subsidiary having control over the documents of a parent corporation, or an individual government officer having control over the documents of an entire agency. Thus, arguing that “the agencies identified by Meta are distinct entities under Hawai'i law. [The Hawai'i Attorney General] is one of a

1 maximum of twenty principal departments within the Executive Branch” is simply re-stating the
 2 issue, and not determinative of the issue. [Dkt. 738-9 at 2]. The Hawai’i Attorney General’s
 3 argument that: “Each department is headed by a separate executive, and subject to the supervision
 4 of the governor” erroneously conflates the “legal control” issue with “operational control” or
 5 “functional independence” of the head of each entity. *Id.*

6 Further, the Hawai’i Attorney General’s citation to and reliance on *Lobisch v. United States*,
 7 No. CV 20-00370 HG-KJM, 2021 WL 6497240 (D. Hawaii Aug. 19, 2021), is unavailing. In
 8 *Lobisch*, the Plaintiff sued the United States Government and sought party discovery from every
 9 agency of the United States Government, including any branch of the military and any federal
 10 employee. *Id.* at *1. There, the Party seeking discovery made no showing of control and simply
 11 argued based on the plain language of Fed. R. Civ. P. 34. *Id.* at 1–2. The *Lobisch* Court rejected
 12 that Plaintiff’s arguments as contrary to the mandates of Fed. R. Civ. P. 1 as well as contrary to the
 13 Federal Torts Claim Act (the substantive law underlying the lawsuit). *Id.* at 2. Because there was
 14 no attempt to show control in *Lobisch*, that opinion never discusses the issue and never analyzes the
 15 issue under *Citric Acid*. Accordingly, the *Lobisch* decision is not determinative or even germane to
 16 the issue here. Unlike in *Lobisch*, here there has been extensive argument over and (as detailed in
 17 this Order) extensive analysis of the control issue under the facts presented.

18 Finally, the Court has recognized that the issue of control of state agency documents, when
 19 a State or State Attorney General is a party, has been litigated and decided in a previous Multi-
 20 District Litigation involving most of the same States and State Attorneys General as are involved in
 21 this case. *Generic Pharmaceuticals (II)*, 699 F. Supp. 3d at 357–58. The *Generic Pharmaceuticals*
 22 *(II)* opinion not only ruled against the objecting States, but also helpfully identified numerous States
 23 which withdrew their objections to party discovery and negotiated a resolution of this issue with the
 24 opposing party there. *Id.* at 356 n.5. In that case, Hawai’i is identified as one of the States which
 25 reached agreement on the state agency control issue without requiring that court to expend resources
 26 resolving the dispute there. *Id.* Given that the *Generic Pharmaceuticals (II)* opinion resolved the
 27 control issue against all the remaining objecting states and given that Hawai’i was able to reach a
 28 negotiated resolution of the dispute in that Multi-District Litigation, this Court is disappointed that

1 the Hawai'i Attorney General and Meta were unable to reach a negotiated resolution of this dispute.
2 As the Court has repeatedly encouraged the Parties at multiple Discovery Management Conferences,
3 they should make every effort to work out discovery disputes through reasonable, good faith
4 negotiations between able and experienced counsel, particularly where, as here, there is guidance in
5 precedent on the discovery issue at hand.

6 **IX. IDAHO**

7 In opposition to the control issue, the Idaho Attorney General argues primarily the following
8 factors: (1) the Idaho Attorney General is a separate entity and independent from the Idaho agencies;
9 (2) the Idaho Attorney General may demand records from other agencies; however, it may only do
10 so pursuant to statute; and (3) the Idaho Attorney General brought the lawsuit under its own
11 independent law enforcement capacity. [Dkt. 738-10 at 2].

12 In support of a finding of control with regard to these state agencies' documents, Meta argues
13 primarily that Idaho agencies are proscriptively barred from obtaining counsel other than the Idaho
14 Attorney General, with limited exceptions. *Id.* at 3. Here, Meta seeks discovery from the following
15 agencies: Commerce Department; Education Board; Education Department; Governor's Office; and
16 Health and Welfare Department. *Id.*

17 After considering the factors argued in the briefs, the Court finds that the factors weigh in
18 favor of a finding that the Idaho Attorney General does not have legal control, for purposes of
19 discovery, over the Idaho agencies in dispute. While the Idaho Attorney General must act as the
20 legal counsel for the Idaho agencies, this requirement does not override the statutory limitation that
21 the Attorney General may only demand documents from these agencies if explicitly permitted by
22 statute. Since the present lawsuit was initiated under the Idaho Attorney General's independent law
23 enforcement capacity and no relevant statute grants the Idaho Attorney General authority to demand
24 documents from the Idaho agencies in question, the Court concludes that the Idaho Attorney General
25 does not have legal control, for the purposes of discovery, over the Idaho agencies in dispute.

26 Under Idaho's statutory scheme, the Idaho Attorney General shall "perform all legal services
27 for the state and to represent the state and all departments, agencies, offices, officers, boards,
28 commissions, institutions and other state entities in all courts and before all administrative tribunals

1 or bodies of any nature.” Idaho Code § 67-1401(1). Additionally, the Idaho Attorney General is
2 required to “advise all departments, agencies, offices, officers, boards, commissions, institutions
3 and other state entities in all matters involving questions of law.” Idaho Code § 67-1401(2).
4 Furthermore, “no department, agency, office, officers, board, commission, institution or other state
5 entity shall be represented by or obtain its legal advice from an attorney at law other than the attorney
6 general,” with certain exceptions. Idaho Code § 67-1406. One such exception potentially relevant
7 includes “colleges and universities” which “may employ private counsel to advise them and
8 represent them before courts of the *state of Idaho*.” Idaho Code § 67-1406(2). However, the instant
9 matter is not before the State of Idaho.

10 Further, the Court notes that the State Attorneys General have filed an Administrative
11 Motion to file supplemental information that Meta has recently served an intent to issue subpoenas
12 to various state agencies. *See* Dkt. 1031-5. None of these state agencies are allowed to employ
13 legal counsel other than the Idaho Attorney General and thus by statute each must be represented
14 by the Idaho Attorney General in this matter for discovery. This arrangement indicates strongly that
15 the state Attorney General, in fulfilling its role as chief legal advisor, would necessarily and
16 inherently have access to and control over the necessary documents for effective legal representation
17 of these state agencies. Therefore, the Court concludes that the Idaho Attorney General has legal
18 control, for the purposes of discovery, over the documents held by the Idaho agencies listed by Meta,
19 including in particular the three agencies recently listed in the intent to issue subpoenas.

20 Finally, the Court has recognized that the issue of control of state agency documents, when
21 a State or State Attorney General is a party, has been litigated and decided in a previous Multi-
22 District Litigation involving most of the same States and State Attorneys General as are involved in
23 this case. *See Generic Pharmaceuticals (II)*, 699 F. Supp. 3d at 357–58. The *Generic*
24 *Pharmaceuticals (II)* opinion not only ruled against the objecting States, but also helpfully identified
25 numerous States which withdrew their objections to party discovery and negotiated a resolution of
26 this issue with the opposing party there. *Id.* at 356 n.5. In that case, Idaho is identified as one of
27 the States which reached agreement on the state agency control issue without requiring that court to
28 expend resources resolving the dispute there. *Id.* Given that Idaho was able to reach a negotiated

1 resolution of the control dispute in that Multi-District Litigation, this Court is disappointed that Meta
2 and Idaho were unable to reach a negotiated resolution of this dispute. As the Court has repeatedly
3 encouraged the Parties at multiple Discovery Management Conferences, they should make every
4 effort to work out discovery disputes through reasonable, good faith negotiations between able and
5 experienced counsel, particularly where, as here, there is guidance in precedent on the discovery
6 issue at hand.

7 **X. ILLINOIS**

8 In opposition to the control issue, the Illinois Attorney General argues primarily the
9 following factors: (1) the Illinois Attorney General is a separate entity and independent from the
10 Illinois agencies; and (2) the Illinois Attorney General brought the lawsuit under its own
11 independent law enforcement capacity. [Dkt. 738-11 at 2].

12 In support of a finding of control with regard to these state agencies' documents, Meta argues
13 primarily that the Illinois Attorney General is required to represent Illinois agencies, pursuant to the
14 Illinois Constitution. *Id.* at 3. Here, Meta seeks discovery from the following agencies: Board of
15 Education; Board of Higher Education; Department of Children and Family Services; Department
16 of Commerce and Economic Opportunity; Department of Human Services; Department of Public
17 Health; and Office of the Governor. *Id.*

18 After considering the factors argued in the briefs, the Court finds that the factors weigh in favor of
19 a finding that the Illinois Attorney General does have legal control, for purposes of discovery, over
20 the Illinois agencies in dispute. While the Illinois Attorney General is a separate entity and while
21 the Illinois Attorney General does bring the instant action in its own independent authority, this does
22 not outweigh the requirement that the Illinois Attorney General is "the legal officer of the State."
23 Ill. Const. Art. V, § 15. The Illinois Constitution has been interpreted to require that the Illinois
24 Attorney General represent state agencies. *People ex rel. Sklodowski v. State*, 642 N.E.2d 1180,
25 1184 (Ill. 1994), *as modified on denial of reh'g* (Nov. 15, 1994). Indeed, the Illinois Attorney
26 General admits that "the [Illinois Attorney General] has broad statutory and common law powers to
27 conduct litigation on behalf of State agencies[.]" [Dkt. 738-11 at 2].

28 Indeed, the Illinois Attorney General confirmed that its office could represent all of the

1 Illinois agencies at issue if Meta were to serve those agencies with a subpoena in this matter. [Dkt.
2 738-1 at 11–12]. Accordingly, it appears that under the Illinois Constitutional scheme each will
3 likely be represented by the Illinois Attorney General in this matter for discovery, whether because
4 of any future subpoenas or because the Court finds control for purposes of discovery. *See Env’t*
5 *Prot. Agency v. Pollution Control Bd.*, 372 N.E.2d 50, 51 (Ill. 1977). Thus, because the Illinois
6 Attorney General appears likely to be involved in representing these state agencies in any event in
7 this case, whether to respond to subpoenas or to respond to party discovery.

8 Relatedly, the Illinois Attorney General has taken the position that any past or future
9 communications between any the Illinois Attorney General and these state agencies, if they are
10 responsive to Meta’s discovery requests, would be covered by the attorney-client privilege. [Dkt.
11 738-11 at 2]. Indeed, the Illinois Attorney General admits that “attorney-client relationship exists
12 between a State agency and the Attorney General.” *Id.* (quoting *Env’t Prot. Agency*, 372 N.E.2d at
13 52). “[T]o the extent that [the State] asserts an attorney-client privilege with these legislators, it
14 does so solely in their official capacities [I]t is inconsistent for the State to argue that on one
15 hand the [State] Attorney General represents these individuals, but that for discovery purposes the
16 [Plaintiff] United States must resort to Federal Rule of Civil Procedure 45.” *Perez*, 2014 WL
17 1796661, at *2. The fact that the Illinois Attorney General is asserting the attorney-client privilege
18 applies to communications between the Illinois Attorney General’s office and the agencies at issue
19 (and admitting that an attorney-client relationship exists, even as to past communications relevant
20 to discovery in this case) further supports the conclusion of control here.

21 Further, there is no statutory, legal, or administrative rule cited which prohibits the Illinois
22 Attorney General from accessing the relevant documents of any of the state agencies at issue. The
23 Illinois Attorney General cites two statutes which allegedly restrict state agencies from providing
24 “certain types of information to anyone, even other agencies.” Dkt. 738-11 at 2 (citing 20 Ill. Comp.
25 Stat. 2305/2.1(c); 410 Ill. Comp. Stat. 305/9(2)). Those two statutes are not applicable to scope of
26 discovery in this action: Section 2.1(c) relates to “[s]haring of information on reportable illnesses,
27 health conditions, unusual disease or symptom clusters, or suspicious events between and among
28 public health and law enforcement authorities[,]” and Section 9(2) relates to the confidentiality of

1 “[a]ll information and records held by a State agency, local health authority, or health oversight
2 agency pertaining to HIV-related information[.]” The Illinois Legislature knew how to specify
3 restricting sharing of information between agencies and the Illinois Attorney General in these two
4 specific instances, but failed to do so more generally for discovery (unlike, for example, the
5 Delaware Legislature as discussed above), and this lack of a general prohibition supports a finding
6 of control.

7 The Court recognizes that this is a somewhat unusual situation, in which a law enforcement
8 organization, the attorney general, is both a party to the case while also acting as counsel for a third
9 party. However, this would not be the first time that a legal services provider, as counsel for a party,
10 is found to have control over third party documents for purposes of discovery. *See, e.g., Becnel*,
11 2018 WL 691649, at *4 (“Both Salas individually and his law firm, the subpoena recipients and
12 defendants in this court, are counsel of record for the Salas defendants in the Florida lawsuit
13 Thus, a Rule 34 request for production to Salas in the Florida lawsuit required Salas to respond as
14 to responsive materials over which Salas and his law firm had possession, custody or control.”).
15 Indeed, one court has noted that “[i]n general, an attorney is presumed to have control over
16 documents in its client’s possession.” *Perez*, 2014 WL 1796661, at *2. The Court is not holding
17 broadly that there must be a finding of a legal right of access to and thus control over third party
18 client documents in every case involving a legal services provider as a party; rather, under the
19 particular facts here, and under the totality of circumstances viewed in light of applicable legal
20 standards, the Court finds that control exists here.

21 The Illinois Attorney General’s role as counsel for the agencies at issue inherently involves
22 obtaining necessary documents for effective representation in litigation. In acting as counsel, the
23 Illinois Attorney General would necessarily have access to and thus control over the relevant
24 documents needed to respond to discovery requests. *See Monsanto*, 2023 WL 4083934, at *5–6
25 (finding state Attorney General has control over agency documents “based on his broad statutory
26 and common law powers to control and manage legal affairs on behalf of state agencies, has a legal
27 right to obtain responsive documents from the state agencies referenced in the Complaint”). To the
28 extent the Illinois Attorney General argues that the Illinois Attorney General and the Illinois

Governor “are independently elected by the State’s voters; they serve in different roles, enjoy unique rights and responsibilities, and have control over separate governmental functions,” *see* dkt. 738-11 at 2, that argument misapprehends the “legal control” test for documents – the issue is not simply whether one entity is under the day-to-day operational control of the other (such as a parent-wholly-owned-subsidary relationship), and not simply whether the two entities are legally separate (such as two different and separately incorporated entities), but rather whether there is a legal right to obtain the documents as explained by *Citric Acid*. ““The control analysis for Rule 34 purposes does not require the party to have actual managerial power over the foreign corporation, but rather that there be close coordination between them.”” *St. Jude Medical S.C., Inc.*, 305 F.R.D. at 638. Here, the attorney-client relationship between the state Attorney General and the state agencies (a relationship mandated by state law) necessitates close coordination. While operational control may be a factual situation which demonstrates a legal right to obtain the documents, the absence of such “executive or functional control” is not determinative for evaluating “control” for purposes of discovery. By definition, the “legal control” issue for discovery arises when there are two legally distinct or separate entities – otherwise, if only one entity were involved, there would be no dispute that party discovery covered that one entity. As discussed above, courts have found “control” for purposes of discovery where a party is clearly not in managerial control over the third-party, such as a subsidiary having control over the documents of a parent corporation, or an individual government officer having control over the documents of an entire agency. Thus, arguing that “there is no law that gives the [Illinois Attorney General] control over their [the agencies’] executive functions” is simply re-stating the issue to be decided, and not determinative of the issue. *Id.* The Illinois Attorney General’s argument that these are “independent state agencies” erroneously conflates the “legal control” issue with “operational control” or “functional independence” of each entity.

Finally, the Court has recognized that the issue of control of state agency documents, when a State or State Attorney General is a party, has been litigated and decided in a previous Multi-District Litigation involving most of the same States and State Attorneys General as are involved in this case. *Generic Pharmaceuticals (II)*, 699 F. Supp. 3d at 357–58. The *Generic Pharmaceuticals*

(II) opinion not only ruled against the objecting States, but also helpfully identified numerous States which withdrew their objections to party discovery and negotiated a resolution of this issue with the opposing party there. *Id.* at 356 n.5. In that case, Illinois is identified as one of the States which reached agreement on the state agency control issue without requiring that court to expend resources resolving the dispute there. *Id.* Given that the *Generic Pharmaceuticals (II)* opinion resolved the control issue against all the remaining objecting states and given that Illinois was able to reach a negotiated resolution of the dispute in that Multi-District Litigation, this Court is disappointed that the Illinois Attorney General and Meta were unable to reach a negotiated resolution of this dispute. As the Court has repeatedly encouraged the Parties at multiple Discovery Management Conferences, they should make every effort to work out discovery disputes through reasonable, good faith negotiations between able and experienced counsel, particularly where, as here, there is guidance in precedent on the discovery issue at hand.

XI. INDIANA

In opposition to the control issue, the Indiana Attorney General argues primarily the following factors: (1) the Indiana Attorney General is a separate entity and independent from the Indiana agencies; (2) certain offices are entitled to employ counsel for litigation purposes without approval from the Indiana Attorney General; (3) the Indiana Attorney General brought the lawsuit under its own independent law enforcement capacity; and (4) the Indiana Attorney General is not seeking damages on behalf of the listed agencies. [Dkt. 738-12 at 2].

In support of a finding of control with regard to these state agencies' documents, Meta argues primarily that Indiana agencies are proscriptively barred from obtaining counsel other than the Indiana Attorney General. *Id.* at 3. Here, Meta seeks discovery from the following agencies: Commission on Improving the Status of Children in Indiana; Department of Child Services; Department of Education; Department of Health; Family and Social Services Administration; Governor; Office of Management and Budget; and State Board of Education. *Id.*

After considering the factors argued in the briefs, the Court finds that the factors weigh in favor of a finding that the Indiana Attorney General does have legal control, for purposes of discovery, over the listed Indiana agencies which are not subject to an exception of mandatory

1 representation. While the Indiana Attorney General is a separate entity and while the Indiana
 2 Attorney General does bring the instant action in its own independent authority and does not seek
 3 damages on behalf of the listed agencies, this does not outweigh the requirement that the Indiana
 4 Attorney General will act as the agencies' counsel. The statutory scheme in Indiana requires that
 5 "[t]he attorney general shall have charge of and direct the prosecution of all civil actions that are
 6 brought in the name of the state of Indiana or any state agency." Ind. Code § 4-6-3-2(a). "The
 7 [Indiana] Attorney General's authority to represent the State, *its agencies* and officers is nearly
 8 exclusive, and agencies may not employ any attorney without the written consent of the Attorney
 9 General." *Indiana State Highway Comm'n v. Morris*, 528 N.E.2d 468, 474 (Ind. 1988) (emphasis
 10 added).

11 Importantly, the Indiana Attorney General's arguments do not negate the fact that all of the
 12 Indiana agencies at issue here are barred by Indiana law from obtaining counsel other than the
 13 Indiana Attorney General: "No agency . . . shall have any right to name, appoint, employ, or hire
 14 any attorney or special or general counsel to represent it or perform any legal service in behalf of
 15 the agency and the state without the written consent of the attorney general." Ind. Code § 4-6-5-
 16 3(a). Further, the Court notes that the State Attorneys General have filed an Administrative Motion
 17 to file supplemental information that Meta has recently served an intent to issue subpoenas to various
 18 state agencies, including the Commission on Improving the Status of Children in Indiana, the
 19 Indiana Department of Education, and the Indiana Department of Health. [Dkt. 1031-5 at 227–352].
 20 None of these state agencies are allowed to employ legal counsel other than the Indiana Attorney
 21 General absent consent (and there is no indication of any such consent in the record) and thus by
 22 statute each must be represented by the Indiana Attorney General in this matter for discovery. *See*
 23 Ind. Code §§ 4-6-5-1, -2 (the Indiana Attorney General "shall have the sole right and power" to
 24 assign an attorney "to any agency of the state of Indiana to perform in behalf of such agency"). This
 25 arrangement indicates strongly that the Indiana Attorney General, in fulfilling its statutory role to as
 26 "nearly exclusive" legal representative of state agencies, would necessarily and inherently have
 27 access to and control over the necessary documents for effective legal representation of these state
 28 agencies. Therefore, the Court concludes that the Indiana Attorney General has legal control, for

1 the purposes of discovery, over the documents held by the Indiana agencies listed by Meta, including
2 in particular the three agencies recently listed in the intent to issue subpoenas.

3 Relatedly, the Indiana Attorney General has taken the position that communications between
4 the Indiana Attorney General and these state agencies would be covered by the attorney-client
5 privilege if such communications are encompassed within the scope of discovery sought by Meta.
6 [Dkt. 738-12 at 2]. Indeed, the Indiana Attorney General admits that “Indiana law has long cemented
7 the idea that ‘[t]he relationship of attorney and client clearly applies to the [Indiana] Attorney
8 General and the state agencies he represents, and the attorney-client privilege should protect
9 communications exchanged in that relationship.’” *Id.* “[T]o the extent that [the State] asserts an
10 attorney-client privilege with these legislators, it does so solely in their official capacities [I]t
11 is inconsistent for the State to argue that on one hand the [State] Attorney General represents these
12 individuals, but that for discovery purposes the [Plaintiff] United States must resort to Federal Rule
13 of Civil Procedure 45.” *Perez*, 2014 WL 1796661, at *2. The fact that the Indiana Attorney General
14 is asserting the attorney-client privilege applies to communications between the Indiana Attorney
15 General’s office and the agencies at issue even as to past communications within the scope of
16 relevant discovery in this case further supports the conclusion of control here.

17 Further, there is no statutory, legal, or administrative rule cited which prohibits the Indiana
18 Attorney General from accessing the documents of the state agencies at issue. The Indiana Attorney
19 General argues control is somehow lacking because Indiana law contemplates that the Indiana
20 Attorney General can issue civil investigative demands to state agencies. Dkt. 738-12 at 2 (citing
21 Ind. Code §§ 4-6-3-1, -3 (regarding issuance of civil investigative demands to state agencies)). As
22 Meta argues, however, the fact that there exists a statutory right for the Indiana Attorney General
23 demonstrates that the Indiana Legislature expressly intended there to be a formal mechanism for
24 sharing of documents between state agencies and the Indiana Attorney General. [Dkt. 738 at 3].
25 There is nothing in this statutory scheme which indicates that the procedure for issuing civil
26 investigative demands to agencies is the exclusive manner by which the Indiana Attorney General
27 can obtain documents from state agencies, and rather than implying that the statute prohibits or
28 denigrates from a legal right to obtain documents from state agencies, the statutory scheme here

1 indicates support for (and a legal mechanism for) information sharing between Indiana agencies and
2 the Indiana Attorney General.

3 The Indiana Attorney General does not cite to any general statutory or legal prohibition on
4 the Indiana Attorney General's representing the state agencies in this matter for purposes of
5 discovery. The Indiana Attorney General cites to one entity, the Indiana Economic Development
6 Corporation, which is defined under state law as an "independent instrumentality" and not a state
7 agency, and which has an express statutory right to retain its own legal counsel. Dkt. 738-12 at 2
8 (citing Ind. Code §§ 5-28-3-2, -5-3). Meta expressly disclaims seeking "party discovery" from the
9 Indiana Economic Development Corporation and expressly commits to "treat the Economic
10 Development Corporation as a non-party for purposes of discovery." [Dkt. 738-12 at at 3 n.1].

11 The Indiana Attorney General's role as counsel for the agencies at issue inherently involves
12 obtaining necessary documents for effective representation in litigation. In acting as counsel, the
13 Indiana Attorney General would necessarily have access to and thus control over the relevant
14 documents needed to respond to discovery requests. *See Monsanto*, 2023 WL 4083934, at *5–6
15 (finding state Attorney General has control over agency documents "based on his broad statutory
16 and common law powers to control and manage legal affairs on behalf of state agencies, has a legal
17 right to obtain responsive documents from the state agencies referenced in the Complaint"). To the
18 extent the Indiana Attorney General argues that the Indiana Attorney General "is a separately elected
19 and statutorily created office" from the Indiana Governor, *see* dkt. 738-12 at 2, that argument
20 misapprehends the "legal control" test for documents – the issue is not simply whether one entity is
21 under the day-to-day operational control of the other (such as a parent-wholly-owned-subsidiary
22 relationship), and not simply whether the two entities are legally separate (such as two different and
23 separately incorporated entities), but rather whether there is a legal right to obtain the documents as
24 explained by *Citric Acid*. "The control analysis for Rule 34 purposes does not require the party to
25 have actual managerial power over the foreign corporation, but rather that there be close
26 coordination between them." *St. Jude Medical S.C., Inc.*, 305 F.R.D. at 638. Here, the attorney-
27 client relationship between the state Attorney General and the state agencies (a relationship
28 mandated by state law) necessitates close coordination. While operational control may be a factual

1 situation which demonstrates a legal right to obtain the documents, the absence of such “executive
2 or functional control” is not determinative for evaluating “control” for purposes of discovery. By
3 definition, the “legal control” issue for discovery arises when there are two legally distinct or
4 separate entities – otherwise, if only one entity were involved, there would be no dispute that party
5 discovery covered that one entity. As discussed above, courts have found “control” for purposes of
6 discovery where a party is clearly not in managerial control over the third-party, such as a subsidiary
7 having control over the documents of a parent corporation, or an individual government officer
8 having control over the documents of an entire agency. Thus, arguing that the Indiana Attorney
9 General “does not exert generalized control over the agencies or their documents,” dkt. 738-12 at 2,
10 is simply re-stating the issue to be decided, and not determinative of the issue. The Indiana Attorney
11 General’s argument that these are “agencies are not subject to management by [the Indiana Attorney
12 General], are not directed by [the Indiana Attorney General],” erroneously conflates the legal control
13 issue with “operational control” or “functional independence” of each entity, and thus is insufficient
14 to rebut a finding of legal control of the documents for purposes of discovery. *Id.*

15 The Court recognizes that this is a somewhat unusual situation, in which a law enforcement
16 organization, the attorney general, is both a party to the case while also acting or able to act as
17 counsel for a third party. However, this would not be the first time that a legal services provider, as
18 counsel for a party, is found to have control over third party documents for purposes of discovery.
19 *See, e.g., Becnel*, 2018 WL 691649, at *4 (“Both Salas individually and his law firm, the subpoena
20 recipients and defendants in this court, are counsel of record for the Salas defendants in the Florida
21 lawsuit Thus, a Rule 34 request for production to Salas in the Florida lawsuit required Salas
22 to respond as to responsive materials over which Salas and his law firm had possession, custody or
23 control.”). Indeed, one court has noted that “[i]n general, an attorney is presumed to have control
24 over documents in its client’s possession.” *Perez*, 2014 WL 1796661, at *2. The Court is not
25 holding broadly that there must be a finding of a legal right of access to and thus control over third
26 party client documents in every case involving a legal services provider as a party; rather, under the
27 particular facts here, and under the totality of circumstances viewed in light of applicable legal
28 standards, the Court finds that control exists here.

1 Finally, the Court has recognized that the issue of control of state agency documents, when
2 a State or State Attorney General is a party, has been litigated and decided in a previous Multi-
3 District Litigation involving most of the same States and State Attorneys General as are involved in
4 this case. *Generic Pharmaceuticals (II)*, 699 F. Supp. 3d at 357–58. The *Generic Pharmaceuticals*
5 (*II*) opinion not only ruled against the objecting States, but also helpfully identified numerous States
6 which withdrew their objections to party discovery and negotiated a resolution of this issue with the
7 opposing party there. *Id.* at 356 n.5. In that case, Indiana is identified as one of the States which
8 reached agreement on the state agency control issue without requiring that court to expend resources
9 resolving the dispute there. *Id.* Given that the *Generic Pharmaceuticals (II)* opinion resolved the
10 control issue against all the remaining objecting states and given that Indiana was able to reach a
11 negotiated resolution of the dispute in that Multi-District Litigation, this Court is disappointed that
12 the Indiana Attorney General and Meta were unable to reach a negotiated resolution of this dispute.
13 As the Court has repeatedly encouraged the Parties at multiple Discovery Management Conferences,
14 they should make every effort to work out discovery disputes through reasonable, good faith
15 negotiations between able and experienced counsel, particularly where, as here, there is guidance in
16 precedent on the discovery issue at hand.

17 XII. KANSAS

18 In opposition to the control issue, the Kansas Attorney General argues primarily the
19 following factors: (1) the Kansas Attorney General is a separate entity and independent from the
20 Kansas agencies; (2) Kansas agencies are statutorily responsible for maintaining, preserving,
21 retaining, and providing access to its own records; and (3) the Kansas Attorney General brought the
22 lawsuit under its own independent law enforcement capacity. [Dkt. 738-13 at 2].

23 In support of a finding of control with regard to these state agencies' documents, Meta argues
24 primarily that the Kansas Attorney General must appear for the state and control the state's
25 prosecution or defense. *Id.* at 3. Here, Meta seeks discovery from the following agencies: Board of
26 Regents; Department for Aging and Disability Services; Department for Children and Families;
27 Department of Administration; Department of Commerce; Department of Education; Department
28 of Health and Environment; and Governor. *Id.*

After considering the factors argued in the briefs, the Court finds that the factors weigh in favor of a finding that the Kansas Attorney General has legal control, for purposes of discovery, over the listed Kansas agencies. First, the statutory scheme in Kansas requires that “[t]he attorney general **shall** appear for the state, and prosecute and defend any and all actions and proceedings, civil or criminal, . . . in all federal courts, in which the state shall be **interested** or a party, and **shall**, when so appearing, control the state’s prosecution or defense.” Kan. Stat. § 75-702(a) (emphasis added). It cannot be seriously disputed that the State of Kansas is interested when one or more of its state agencies are the target of discovery in a federal action. Second, the Kansas Attorney General is the chief legal officer for the state of Kansas. *DeBerry v. Kansas State Bd. of Acct.*, 196 P.3d 958, 958 (Kan. Ct. App. 2008) (“Acting as counsel for the Board, which is the administrative agency in charge of regulating the practice of certified public accountancy in the state of Kansas, is entirely consistent with the attorney general’s role as chief legal officer for the State. Although the legislature has identified various situations in which the attorney general is *required* to provide representation, we find no Kansas law that precludes the attorney general from representing the Board under the particular circumstances presented in this case.”) (emphasis in original). Further, Kansas’s statutory scheme requires that “[t]he attorney general **shall** . . . prosecute or **defend** for the state **all actions**, civil or criminal, relating to any matter **connected with their departments**.” Kan. Stat. § 75-703 (emphasis added).

Importantly, the Kansas Attorney General’s arguments do not negate the fact that (unlike other states) there is no cited law or statute which empowers any of the Kansas agencies at issue here to employ or obtain counsel in this matter other than the Attorney General. [Dkt. 738-13 at 2]. Indeed, the Kansas Attorney General confirmed that its office would definitely represent all of the Kansas agencies at issue if Meta were to serve those agencies with a subpoena in this matter. [Dkt. 738-1 at 13]. Accordingly, it appears that under the statutory scheme each agency will be represented by the Kansas Attorney General in this matter for discovery. *See* Kan. Stat. §§ 75-702, -703. Curiously, the Kansas Attorney General takes the position that it would not represent the listed agencies. [Dkt. 738-1 at 13]. However, on the record before the Court, this is an error of law because neither of these agencies are exempt from the express prohibition on retaining different

1 counsel. Thus, because the Kansas Attorney General will be involved in representing these state
2 agencies in any event in this case, whether to respond to subpoenas or to respond to party discovery.

3 Relatedly, the Kansas Attorney General has taken the position that communications between
4 the Kansas Attorney General and these state agencies would be covered by the attorney-client
5 privilege if such communications are encompassed within the scope of discovery sought by Meta.
6 [Dkt. 738-13 at 2]. “[T]o the extent that [the State] asserts an attorney-client privilege with these
7 legislators, it does so solely in their official capacities [I]t is inconsistent for the State to argue
8 that on one hand the [State] Attorney General represents these individuals, but that for discovery
9 purposes the [Plaintiff] United States must resort to Federal Rule of Civil Procedure 45.” *Perez*,
10 2014 WL 1796661, at *2. Just as the Court in *Perez* rejected the inconsistent approach to privilege
11 there, here the Kansas Attorney General argues that “the Attorney General does not **currently**
12 represent any of the identified agencies” while at the same time arguing that “**if** another state agency
13 requests legal representation or legal advice from the [Kansas] Attorney General’s Office, or
14 receives a discovery request in this litigation, information related to those communications with that
15 agency **are privileged**, under privilege doctrines including attorney-client privilege.” Dkt 738-13 at
16 2 (emphasis added). The Kansas Attorney General’s attempt to preserve the ability to assert the
17 attorney-client privilege between the Kansas Attorney General’s office and the agencies at issue
18 further supports the conclusion of control here. Here, it is illusory to argue “if” the Kansas Attorney
19 General would represent the state agencies – the Kansas Attorney General has already confirmed
20 that their office will do so for discovery in this matter. [Dkt. 738-1 at 13]. Assertion of the attorney-
21 client privilege requires, as a prerequisite, the existence of an attorney-client relationship. *See Graf*,
22 610 F.3d at 1156.

23 Further, there is no statutory, legal, or administrative rule cited which prohibits the Kansas
24 Attorney General from accessing the documents of the state agencies at issue for purposes of
25 discovery. The Kansas Attorney General’s argument that the Kansas Attorney General must use
26 either the Kansas Open Records Act, Kan. Stat. § 45-215 *et seq.*, or a subpoena to obtain documents
27 from state agencies who are their client is not a credible interpretation of the Kansas Open Records
28 Act – there is no citation that a public records request is the only way for the Kansas Attorney

1 General to get documents from state agencies they are representing in litigation. [Dkt. 738-8 at 2].
2 If the Kansas Attorney General were correct, then the Kansas Attorney General would have to
3 submit an Open Records Act request even when representing a state agency, to get documents from
4 its own client – which is not merely impractical and not believable but also contrary to the principles
5 of effective legal representation. If the Kansas Attorney General’s supposition that, every time the
6 Kansas Attorney General seeks documents from state agencies, Open Records Act requests would
7 be routine and necessary, then the logical conclusion is that Open Records Act would be a routinely
8 used legal right to access those documents and records of the agency subject to the Act. At least
9 one court has found that a state “public records” Freedom of Information Act constitutes a legal
10 right to access documents from an agency for purposes of “control” under Rule 34. *See Flagg*, 252
11 F.R.D. at 355–57 (“Because at least some of the text messages maintained by [(third party)] SkyTel
12 are ‘public records’ within the meaning of Michigan’s FOIA, it would be problematic, to say the
13 least, to conclude that the [named defendant] City lacks a legal right to obtain these records as
14 necessary to discharge its statutory duty of disclosure.”). As counsel, the Kansas Attorney General
15 will have the normal type of direct access to the necessary documents from its own clients, without
16 resorting to public channels, ensuring efficient and comprehensive legal support for the agencies
17 involved. The Kansas Open Records Act is not an impediment to that access, because that Act only
18 applies to records which are to be produced for public inspection (and not for purposes of litigation
19 such as this case in which there is a Protective Order limiting public availability of confidential
20 documents). Kan. Stat. § 45-220(a). Further, the Kansas Open Records Act nowhere states that this
21 statute is the only means by which the Kansas Attorney General can obtain records from other state
22 agencies – the statute merely sets up a permissive system for public inspection, not a restriction or
23 limitation on access. Indeed, the Kansas Attorney General has cited no precedent requiring the
24 Kansas Attorney General to use either an Open Records Act request or a subpoena to obtain
25 documents from state agencies represented in litigation by the Kansas Attorney General. The Court
26 finds this argument to be wholly unpersuasive. Finally, the argument that there is no statute or law
27 specifically authorizing the Kansas Attorney General “unfettered access to or the right to compel
28 document production of other agencies’ documents” is legally incorrect. Control, for purposes of

1 Rule 34, does not require showing “unfettered access” to all state agencies’ documents under all
2 circumstances. *Monsanto*, 2023 WL 4083934, at *5 (“Despite the State’s characterization of the
3 issue, we need not decide whether the Illinois Attorney General has “unfettered access to all state
4 agencies’ records under all circumstances.” Rather, the issue is one of “control” under Rule 34 –
5 nothing more, nothing less.”). Further, the state Attorney General’s argument implicitly assumes
6 an overly restrictive view of the control test for documents under Rule 34. To the contrary, courts
7 have recognized that control for purposes of document discovery is liberally construed. *E.g.*,
8 *Miniace*, 2006 WL 335389, at *1; *Evans*, 2010 WL 1136216, at *1–2; *Inland Concrete Enterprises,*
9 *Inc.*, 2011 WL 13209239, at *3–4.

10 Additionally, the Kansas Attorney General does not cite any statutory or legal prohibition
11 on the Kansas Attorney General’s representing the state agencies in this matter for purposes of
12 discovery. The Court recognizes that this is a somewhat unusual situation, in which a law
13 enforcement organization, the attorney general, is both counsel for a party to the case while also
14 acting or able to act as counsel for a third party. However, this would not be the first time that a
15 legal services provider, as counsel for a party, is found to have control over third party documents
16 for purposes of discovery. *See, e.g., Becnel*, 2018 WL 691649, at *4 (“Both Salas individually and
17 his law firm, the subpoena recipients and defendants in this court, are counsel of record for the Salas
18 defendants in the Florida lawsuit Thus, a Rule 34 request for production to Salas in the Florida
19 lawsuit required Salas to respond as to responsive materials over which Salas and his law firm had
20 possession, custody or control.”). Indeed, one court has noted that “[i]n general, an attorney is
21 presumed to have control over documents in its client’s possession.” *Perez*, 2014 WL 1796661, at
22 *2. The Court is not holding broadly that there must be a finding of a legal right of access to and
23 thus control over third party client documents in every case involving a legal services provider as a
24 party; rather, under the particular facts here, and under the totality of circumstances viewed in light
25 of applicable legal standards, the Court finds that control exists here.

26 The Kansas Attorney General’s role as counsel for the agencies at issue inherently involves
27 obtaining necessary documents for effective representation in litigation. In acting as counsel, the
28 Kansas Attorney General would necessarily have access to and thus control over the relevant

documents needed to respond to discovery requests. *See Monsanto*, 2023 WL 4083934, at *5–6 (finding state Attorney General has control over agency documents “based on his broad statutory and common law powers to control and manage legal affairs on behalf of state agencies, has a legal right to obtain responsive documents from the state agencies referenced in the Complaint”). To the extent the Kansas Attorney General argues that the Kansas Attorney General “separate and distinct elected entity with separate duties and responsibilities as delineated in the Kansas Constitution and Kansas law,” *see* dkt. 738-13 at 2, that argument misapprehends the “legal control” test for documents – the issue is not simply whether one entity is under the day-to-day operational control of the other (such as a parent-wholly-owned-subsidiary relationship), and not simply whether the two entities are legally separate (such as two different and separately incorporated entities), but rather whether there is a legal right to obtain the documents as explained by *Citric Acid*. ““The control analysis for Rule 34 purposes does not require the party to have actual managerial power over the foreign corporation, but rather that there be close coordination between them.”” *St. Jude Medical S.C., Inc.*, 305 F.R.D. at 638. Here, the attorney-client relationship between the state Attorney General and the state agencies (a relationship mandated by state law) necessitates close coordination. While operational control may be a factual situation which demonstrates a legal right to obtain the documents, the absence of such “executive or functional control” is not determinative for evaluating “control” for purposes of discovery. By definition, the “legal control” issue for discovery arises when there are two legally distinct or separate entities – otherwise, if only one entity were involved, there would be no dispute that party discovery covered that one entity. As discussed above, courts have found “control” for purposes of discovery where a party is clearly not in managerial control over the third-party, such as a subsidiary having control over the documents of a parent corporation, or an individual government officer having control over the documents of an entire agency. Thus, arguing that the Kansas Attorney General “is not suing on behalf of or representing any state agency in this litigation; rather, he brings this action under independent statutory authority,” dkt. 738-13 at 2, is simply re-stating the issue to be decided, and not determinative of the issue. The Kansas Attorney General’s arguments erroneously conflate the legal control issue with “operational control” or “functional independence” of each entity, and thus is

1 insufficient to rebut a finding of legal control of the documents for purposes of discovery.

2 In opposition, the Kansas Attorney General cites and relies upon *Amex*, 2011 WL 13073683,
3 and *Warner Chilcott Holdings*, 2007 WL 9813287, at *4–5. [Dkt. 78-13 at 2]. As discussed above
4 (and incorporated herein), the Court finds neither of these cases to be persuasive (and neither is
5 binding). Both cases focus on the issue of executive control and the structure of the executive branch
6 of the local state government, and as discussed above, the Ninth Circuit’s standard for control is not
7 limited to or determined by whether there is “operational control” of one entity by another in day-
8 to-day functions. *Citric Acid*, 191 F.3d at 1107–08 (explaining that control over local unions was
9 not found in *International Union* even though the national union could theoretically dissolve and
10 take over the operations and hence the documents of the local unions).

11 Finally, the Court has recognized that the issue of control of state agency documents, when
12 a State or State Attorney General is a party, has been litigated and decided in a previous Multi-
13 District Litigation involving most of the same States and State Attorneys General as are involved in
14 this case. *Generic Pharmaceuticals (II)*, 699 F. Supp. 3d at 357–58. The *Generic Pharmaceuticals*
15 *(II)* opinion not only ruled against the objecting States, but also helpfully identified numerous States
16 which withdrew their objections to party discovery and negotiated a resolution of this issue with the
17 opposing party there. *Id.* at 356 n.5. In that case, Kansas is identified as one of the States which
18 reached agreement on the state agency control issue without requiring that court to expend resources
19 resolving the dispute there. *Id.* Given that the *Generic Pharmaceuticals (II)* opinion resolved the
20 control issue against all the remaining objecting states and given that Kansas was able to reach a
21 negotiated resolution of the dispute in that Multi-District Litigation, this Court is disappointed that
22 the Kansas Attorney General and Meta were unable to reach a negotiated resolution of this dispute.
23 As the Court has repeatedly encouraged the Parties at multiple Discovery Management Conferences,
24 they should make every effort to work out discovery disputes through reasonable, good faith
25 negotiations between able and experienced counsel, particularly where, as here, there is guidance in
26 precedent on the discovery issue at hand.

27 **XIII. KENTUCKY**

28 In opposition to the control issue, the Kentucky Attorney General argues primarily the

1 following factors: (1) the Kentucky Attorney General is a separate entity and independent from the
 2 Kentucky agencies; (2) only two agencies, which are not on Meta's listed agencies, allow the
 3 Kentucky Attorney General to have access to material evidence and information; (3) Kentucky
 4 agencies have their own staffing and capacity to independently initiate and participate in litigation
 5 and retain counsel as they see fit; and (4) the Kentucky Attorney General brought the lawsuit under
 6 its own independent law enforcement capacity. [Dkt. 738-14 at 2].

7 In support of a finding of control with regard to these state agencies' documents, Meta argues
 8 primarily the Kentucky Attorney General must act as chief legal officer tasked with attending to the
 9 legal business of Kentucky state agencies. *Id.* at 3. Here, Meta seeks discovery from the following
 10 agencies: Board of Education, Cabinet for Health and Family Services, Department for Behavioral
 11 Health, Developmental and Intellectual Disabilities, Department for Business Development,
 12 Department for Public Health, Department of Education, Finance and Administration Cabinet,
 13 Governor, and Office of State Budget Director. *Id.*

14 After considering the factors argued in the briefs, the Court finds that the factors weigh in
 15 favor of a finding that the Kentucky Attorney General has legal control, for purposes of discovery,
 16 over the listed Kentucky agencies. First, the Kentucky "Attorney General is the chief law officer of
 17 the Commonwealth of Kentucky and all of its departments, commissions, agencies, and political
 18 subdivisions, and the legal adviser of all state officers, departments, commissions, and agencies[.]"
 19 Ky. Rev. Stat. § 15.020(1). Second, the statutory scheme in Kentucky requires that "the Attorney
 20 General **shall . . . enter an appearance in all cases**, hearings, and proceedings in and before all
 21 other courts, tribunals, or commissions in or out of the state, **and attend to all litigation** and legal
 22 business in or out of the state required of the office by law, or in which the Commonwealth has an
 23 interest, **and any litigation** or legal business that **any** state officer, department, commission, or
 24 **agency may have** in connection with, or growing out of, his, her, or **its official duties**[.]" Ky. Rev.
 25 Stat. § 15.020(3) (emphasis added).

26 The Court notes that the State Attorneys General have filed an Administrative Motion to file
 27 supplemental information that Meta has recently served an intent to issue subpoenas to various state
 28 agencies. *See* Dkt. 1031-5. Indeed, the Kentucky Attorney General confirmed that its office could

1 represent all of the state agencies at issue if Meta were to serve those agencies with a subpoena in
 2 this matter. [Dkt. 738-1 at 13–14]. Accordingly, it appears that under the statutory scheme each
 3 agency will likely be represented by the Kentucky Attorney General in this matter for discovery.
 4 *See* Ky. Rev. Stat. § 15.020(1). Thus, because the Kentucky Attorney General will likely be
 5 involved in representing these state agencies in any event in this case, whether to respond to
 6 subpoenas or to respond to party discovery.

7 The Kentucky Attorney General relies on statutory authority for Kentucky agencies to hire
 8 their own counsel to demonstrate that the Kentucky Attorney General may have no role in
 9 representing the agencies here and thus would not have control. Dkt. 738-14 at 2 (citing Ky. Rev.
 10 Stat. § 12.210). However, the Kentucky Legislature made clear that this statute does not denigrate
 11 from Section 15.020 quoted above which requires that the Kentucky Attorney General “shall”
 12 appear in any litigation that any agency may have in connection with its official duties. *See* Ky.
 13 Rev. Stat. § 12.230 (“KRS 15.020 shall remain in full force and effect, except to the extent the same
 14 is in conflict with KRS 12.200 to 12.220[.]”). Further, the Kentucky statutory scheme continues to
 15 recognize that “[t]he [Kentucky] Governor or any department **may require the advice or**
 16 **services** of the Attorney General and the assistant attorneys general in matters relating to the duties
 17 or functions of **any such office or department.**” *Id.* (emphasis added).

18 Further, there is no statutory, legal, or administrative rule cited which prohibits the Kentucky
 19 Attorney General from accessing the documents of the state agencies at issue for purposes of
 20 discovery. To the contrary, the Kentucky Attorney General admits that state law requires that “[a]ll
 21 **departments, agencies, officers, and employees of the Commonwealth shall fully cooperate with**
 22 **the [Kentucky] Attorney General** in carrying out the functions of [Kentucky consumer protection
 23 laws].” Ky. Rev. Stat. § 367.160(1) (emphasis added). This statutory requirement affords the
 24 Kentucky Attorney General the legal right to obtain documents from state agencies when enforcing
 25 state consumer protection laws, thus satisfying the *Citric Acid* test for control here.

26 The Court recognizes that this is a somewhat unusual situation, in which a law enforcement
 27 organization, the attorney general, is both counsel for a party to the case while also acting or able to
 28 act as counsel for a third party. However, this would not be the first time that a legal services

1 provider, as counsel for a party, is found to have control over third party documents for purposes of
2 discovery. *See, e.g., Becnel*, 2018 WL 691649, at *4 (“Both Salas individually and his law firm,
3 the subpoena recipients and defendants in this court, are counsel of record for the Salas defendants
4 in the Florida lawsuit Thus, a Rule 34 request for production to Salas in the Florida lawsuit
5 required Salas to respond as to responsive materials over which Salas and his law firm had
6 possession, custody or control.”). Indeed, one court has noted that “[i]n general, an attorney is
7 presumed to have control over documents in its client’s possession.” *Perez*, 2014 WL 1796661, at
8 *2. The Court is not holding broadly that there must be a finding of a legal right of access to and
9 thus control over third party client documents in every case involving a legal services provider as a
10 party; rather, under the particular facts here, and under the totality of circumstances viewed in light
11 of applicable legal standards, the Court finds that control exists here.

12 The Kentucky Attorney General’s likely role as counsel for the agencies at issue would
13 inherently involve obtaining necessary documents for effective representation in litigation. In acting
14 as counsel, the Kentucky Attorney General would necessarily have access to and thus control over
15 the relevant documents needed to respond to discovery requests. *See Monsanto*, 2023 WL 4083934,
16 at *5–6 (finding state Attorney General has control over agency documents “based on his broad
17 statutory and common law powers to control and manage legal affairs on behalf of state agencies,
18 has a legal right to obtain responsive documents from the state agencies referenced in the
19 Complaint”). To the extent the Kentucky Attorney General argues that the “Kentucky agencies at
20 issue . . . are distinct and separate entities,” *see* dkt. 738-14 at 2, that argument misapprehends the
21 “legal control” test for documents – the issue is not simply whether one entity is under the day-to-
22 day operational control of the other (such as a parent-wholly-owned-subsidiary relationship), and
23 not simply whether the two entities are legally separate (such as two different and separately
24 incorporated entities), but rather whether there is a legal right to obtain the documents as explained
25 by *Citric Acid*. ““The control analysis for Rule 34 purposes does not require the party to have actual
26 managerial power over the foreign corporation, but rather that there be close coordination between
27 them.”” *St. Jude Medical S.C., Inc.*, 305 F.R.D. at 638. Here, the attorney-client relationship
28 between the state Attorney General and the state agencies (a relationship mandated by state law)

1 necessitates close coordination. While operational control may be a factual situation which
2 demonstrates a legal right to obtain the documents, the absence of such “executive or functional
3 control” is not determinative for evaluating “control” for purposes of discovery. By definition, the
4 “legal control” issue for discovery arises when there are two legally distinct or separate entities –
5 otherwise, if only one entity were involved, there would be no dispute that party discovery covered
6 that one entity. As discussed above, courts have found “control” for purposes of discovery where a
7 party is clearly not in managerial control over the third-party, such as a subsidiary having control
8 over the documents of a parent corporation, or an individual government officer having control over
9 the documents of an entire agency. *See, e.g., Sublett v. Henson*, No. 5:16-CV-00184-TBR, 2018
10 WL 3939333, at *3–6 (W.D. Ky. Aug. 16, 2018) (rejecting objections of named defendants, officers
11 and officials of state prison, to document requests, and finding warden has control over documents
12 of the Kentucky Department of Corrections). Thus, arguing that “[t]he Kentucky Attorney General
13 and [Kentucky] Governor are separately elected constitutional officers of the Commonwealth . . .
14 [and] the other agencies named by Meta are headed by individuals appointed by the Governor,” dkt.
15 738-14 at 2, is simply re-stating the issue to be decided, and not determinative of the issue. The
16 Kentucky Attorney General’s arguments erroneously conflate the legal control issue with
17 “operational control” or “functional independence” of each entity, and thus is insufficient to rebut a
18 finding of legal control of the documents for purposes of discovery.

19 In opposition, the Kentucky Attorney General cites several cases in which the Kentucky
20 Attorney General has been “in direct legal conflict with these agencies.” [Dkt. 738-14 at 2 n.1].
21 This argument is merely another way of restating the “operational independence” argument rejected
22 argument above. The fact that, in other cases involving different issues, the Kentucky Attorney
23 General has been adverse to state agencies is not determinative of whether there is control for
24 purposes of the documents sought in discovery in this case. *Generic Pharmaceuticals (II)*, 699 F.
25 Supp. 3d at 356–57. Just as a joint defense group in a multi-defendant litigation may include
26 companies which, in other venues, are adverse litigants, the law understands that entities may be
27 adverse in one forum and still yet may have aligned legal interests in another.

28 Finally, the Court has recognized that the issue of control of state agency documents, when

a State or State Attorney General is a party, has been litigated and decided in a previous Multi-District Litigation involving most of the same States and State Attorneys General as are involved in this case. *Id.* at 357–58. The *Generic Pharmaceuticals (II)* opinion not only ruled against the objecting States, but also helpfully identified numerous States which withdrew their objections to party discovery and negotiated a resolution of this issue with the opposing party there. *Id.* at 356 n.5. In that case, Kentucky is identified as one of the States which reached agreement on the state agency control issue without requiring that court to expend resources resolving the dispute there. *Id.* Given that the *Generic Pharmaceuticals (II)* opinion resolved the control issue against all the remaining objecting states and given that Kentucky was able to reach a negotiated resolution of the dispute in that Multi-District Litigation, this Court is disappointed that the Kentucky Attorney General and Meta were unable to reach a negotiated resolution of this dispute. As the Court has repeatedly encouraged the Parties at multiple Discovery Management Conferences, they should make every effort to work out discovery disputes through reasonable, good faith negotiations between able and experienced counsel, particularly where, as here, there is guidance in precedent on the discovery issue at hand.

XIV. LOUISIANA

In opposition to the control issue, the Louisiana Attorney General argues primarily the following factors: (1) the Louisiana Attorney General is a separate entity and independent from the Louisiana agencies; and (2) most Louisiana agencies have their own general counsel or contract with outside counsel to handle their other legal needs. [Dkt. 738-15 at 2].

In support of a finding of control with regard to these state agencies' documents, Meta argues primarily that the Louisiana Attorney General acts as the chief legal officer of the state and is required by statute to represent state agencies in all litigation involving tort claims. *Id.* at 3. Here, Meta seeks discovery from the following agencies: Department of Children and Family Services, Department of Education, Department of Health, Department of Economic Development, Office of Planning and Budget, and Office of the Governor. *Id.*

After considering the factors argued in the briefs, the Court finds that the factors weigh in favor of a finding that the Louisiana Attorney General does have legal control, for purposes of

discovery, over the listed Louisiana agencies which are not subject to an exception of mandatory representation. While the Louisiana Attorney General is a separate entity and while the Louisiana Attorney General does bring the instant action in its own independent authority, this does not outweigh the requirement that the Louisiana Attorney General will act as the agencies' counsel. The statutory scheme in Louisiana requires that "[t]he attorney general **shall** represent the state and **all departments and agencies** of state government in **all litigation** arising out of or involving **tort**[" La. Stat. § 49:257(A) (emphasis added). "[C]onsumer protection claims sound in tort[" *Zodiac 21, Inc. v. Oyo Hotels, Inc.*, No. CV 20-63-SDD-RLB, 2020 WL 6479160, at *6 n.56 (M.D. La. Nov. 3, 2020) (analyzing claim under Louisiana Unfair Trade Practice and Consumer Law); *accord Kreger v. Gen. Steel Corp.*, No. CIV.A. 07-575, 2010 WL 2902773, at *12 (E.D. La. July 19, 2010) ("class members' consumer protection claims . . . sound in tort). Indeed, the Louisiana Attorney General admits here that "the Louisiana Attorney General does represent state agencies in specific circumstances, such as litigation arising out of or involving tort[" [Dkt. 738-15 at 2].

Further, the Court notes that the State Attorneys General have filed an Administrative Motion to file supplemental information that Meta has recently served an intent to issue subpoenas to various state agencies, including the Louisiana Department of Education and the Louisiana Department of Health. [Dkt. 1031-5 at 1070–1153]. The Louisiana Attorney General is required by statute to represent each of these agencies in this matter for discovery. *See* La. Stat. § 49:257(A). This arrangement indicates strongly that the Louisiana Attorney General, in fulfilling its state constitutional role as "chief legal officer of the state," La. Const. art. IV, § 8, would necessarily and inherently have access to and control over the necessary documents for effective legal representation of these state agencies. Therefore, the Court concludes that the Louisiana Attorney General has legal control, for the purposes of discovery, over the documents held by the Louisiana agencies listed by Meta, including in particular the agencies recently listed in the intent to issue subpoenas.

The Louisiana Attorney General has taken the position that, because that office "does not represent agencies in this action," communications between the Louisiana Attorney General and these state agencies "are **generally** not protected under the attorney-client privilege." Dkt. 738-15 at 2 (emphasis added). The Louisiana Attorney General's use of the word "generally" reveals the

intention: the Louisiana Attorney General is attempting to preserve the ability to assert the attorney-client privilege later when faced with formal discovery (or this Order). It is illusory to argue the Louisiana Attorney General does not presently represent the state agencies – the Louisiana Attorney General has already confirmed that their office could do so for discovery in this matter. [Dkt. 738-1 at 14–15]. And as discussed above, the Louisiana Legislature requires the Louisiana Attorney General to represent agencies in cases such as this which sound in tort. “[T]o the extent that [the State] asserts an attorney-client privilege with these legislators, it does so solely in their official capacities [I]t is inconsistent for the State to argue that on one hand the [State] Attorney General represents these individuals, but that for discovery purposes the [Plaintiff] United States must resort to Federal Rule of Civil Procedure 45.” *Perez*, 2014 WL 1796661, at *2. Just as the court in *Perez* rejected the inconsistent approach to privilege there, here the Court rejects the Louisiana Attorney General’s apparent intention to argue now (in opposition to this motion) that “generally” the privilege does not apply, while plainly relying on the word “generally” to preserve the ability to assert the privilege later. The Louisiana Attorney General’s attempt to preserve the ability to assert the attorney-client privilege between the Louisiana Attorney General’s office and the agencies at issue further supports the conclusion of control here. Assertion of the attorney-client privilege requires, as a prerequisite, the existence of an attorney-client relationship. *See Graf*, 610 F.3d at 1156.

Further, there is no statutory, legal, or administrative rule cited which prohibits the Louisiana Attorney General from accessing the documents of the state agencies at issue. [Dkt. 738-15 at 2]. Because the Louisiana Attorney General is required to serve as counsel for the Louisiana agencies in litigation arising out of or involving tort, the Court is not persuaded by the argument that “most state agencies have their own general counsel or contract with outside counsel to handle their *other* legal needs.” *Id.* (emphasis added). The instant case falls outside the scope of “their other legal needs” and therefore such authority by the agencies in “other” areas of law is legally irrelevant here. Similarly, the Louisiana Attorney General does not cite to any general statutory or legal prohibition on the Louisiana Attorney General’s representing the state agencies in this matter for purposes of discovery.

1 The Louisiana Attorney General’s role as counsel for the agencies at issue inherently
2 involves obtaining necessary documents for effective representation in litigation. In acting as
3 counsel, the Louisiana Attorney General would necessarily have access to and thus control over the
4 relevant documents needed to respond to discovery requests. *See Monsanto*, 2023 WL 4083934, at
5 *5–6 (finding state Attorney General has control over agency documents “based on his broad
6 statutory and common law powers to control and manage legal affairs on behalf of state agencies,
7 has a legal right to obtain responsive documents from the state agencies referenced in the
8 Complaint”). To the extent the Louisiana Attorney General argues that the Louisiana Attorney
9 General “is an independently elected constitutional officer” from the Louisiana Governor, *see* dkt.
10 738-15 at 2, that argument misapprehends the “legal control” test for documents – the issue is not
11 simply whether one entity is under the day-to-day operational control of the other (such as a parent-
12 wholly-owned-subsidiary relationship), and not simply whether the two entities are legally separate
13 (such as two different and separately incorporated entities), but rather whether there is a legal right
14 to obtain the documents as explained by *Citric Acid*. ““The control analysis for Rule 34 purposes
15 does not require the party to have actual managerial power over the foreign corporation, but rather
16 that there be close coordination between them.”” *St. Jude Medical S.C., Inc.*, 305 F.R.D. at 638.
17 Here, the attorney-client relationship between the state Attorney General and the state agencies (a
18 relationship mandated by state law) necessitates close coordination. While operational control may
19 be a factual situation which demonstrates a legal right to obtain the documents, the absence of such
20 “executive or functional control” is not determinative for evaluating “control” for purposes of
21 discovery. By definition, the “legal control” issue for discovery arises when there are two legally
22 distinct or separate entities – otherwise, if only one entity were involved, there would be no dispute
23 that party discovery covered that one entity. As discussed above, courts have found “control” for
24 purposes of discovery where a party is clearly not in managerial control over the third-party, such
25 as a subsidiary having control over the documents of a parent corporation, or an individual
26 government officer having control over the documents of an entire agency. Thus, arguing that the
27 Louisiana Attorney General “is a separate department under the executive branch,” dkt. 738-15 at
28 2, is simply re-stating the issue to be decided, and not determinative of the issue. The Louisiana

1 Attorney General’s argument that these agencies “are legally distinct entities,” erroneously conflates
2 the legal control issue with “operational control” or “functional independence” of each entity, and
3 thus is insufficient to rebut a finding of legal control of the documents for purposes of discovery.
4 *Id.*

5 The Court recognizes that this is a somewhat unusual situation, in which a law enforcement
6 organization, the attorney general, is both a party to the case while also acting or able to act as
7 counsel for a third party. However, this would not be the first time that a legal services provider, as
8 counsel for a party, is found to have control over third party documents for purposes of discovery.
9 *See, e.g., Becnel*, 2018 WL 691649, at *4 (“Both Salas individually and his law firm, the subpoena
10 recipients and defendants in this court, are counsel of record for the Salas defendants in the Florida
11 lawsuit Thus, a Rule 34 request for production to Salas in the Florida lawsuit required Salas
12 to respond as to responsive materials over which Salas and his law firm had possession, custody or
13 control.”). Indeed, one court has noted that “[i]n general, an attorney is presumed to have control
14 over documents in its client’s possession.” *Perez*, 2014 WL 1796661, at *2. The Court is not
15 holding broadly that there must be a finding of a legal right of access to and thus control over third
16 party client documents in every case involving a legal services provider as a party; rather, under the
17 particular facts here, and under the totality of circumstances viewed in light of applicable legal
18 standards, the Court finds that control exists here.

19 **XV. MAINE**

20 In opposition to the control issue, the Maine Attorney General argues primarily the following
21 factors: (1) the Maine Attorney General is a separate entity and independent from the Maine
22 agencies; (2) the Maine Attorney General brought the lawsuit under its own independent law
23 enforcement capacity; and (3) that the statutes which require the Maine Attorney General to
24 represent Maine agencies does not afford the Maine Attorney General control or access to the Maine
25 agencies’ documents. [Dkt. 738-16 at 2].

26 In support of a finding of control with regard to these state agencies’ documents, Meta argues
27 based primarily on the following factors: (1) the Maine Attorney General is the chief law officer of
28 the state and that the Maine Attorney General must appear for all Maine agencies in all civil actions

1 in which the state is a party; (2) Maine agencies are proscriptively barred from obtaining counsel
2 other than the Maine Attorney General without consent from the Maine Attorney General; and (3)
3 the Maine Attorney General has already confirmed that it would represent the identified agencies in
4 responding to a Meta subpoena. *Id.* at 3. Here, Meta seeks discovery from the following agencies:
5 Department of Economic & Community Development, Department of Education, Department of
6 Health & Human Services, Division of Administration, and Governor’s Office. *Id.*

7 After considering the factors argued in the briefs, the Court finds that the factors weigh in
8 favor of a finding that the Maine Attorney General does have legal control, for purposes of
9 discovery, over the Maine agencies in dispute. The Maine Attorney General admits that the Maine
10 Attorney General is “the chief law officer of the State.” Dkt. 738-16 at 2 (quoting *Lund v. Pratt*,
11 308 A.2d 554, 558 (Me. 1973)). The statutory scheme in Maine requires that “[t]he Attorney General
12 or a deputy, assistant or staff attorney **shall appear** for the State . . . and agencies of the State in **all**
13 **civil actions** and proceedings in which the State is a party or interested . . . in all the courts of the
14 State and in those actions and proceedings before any other tribunal when requested by the Governor
15 or by the Legislature or either House of the Legislature. All such actions and proceedings **must** be
16 prosecuted or defended by the Attorney General or under the Attorney General’s direction.” Me.
17 Rev. Stat. tit. 5, § 191(3) (emphasis added).

18 Importantly, the Maine Attorney General’s arguments do not negate the fact that (unlike
19 other states) there is no cited law or statute which empowers any of the Maine agencies at issue here
20 to employ or obtain counsel in this matter other than the Attorney General absent consent. [Dkt.
21 738-13 at 2]. Under Maine’s statutory scheme, “[a]ll **legal services** required by those officers,
22 boards and commissions in matters relating to their official duties **must be rendered by the Attorney**
23 **General** or under the Attorney General’s direction. The officers or **agencies of the State may not**
24 **act at the expense of the State as counsel, nor employ private counsel** except upon prior written
25 approval of the Attorney General.” Me. Rev. Stat. tit. 5, § 191(3)(B) (emphasis added). Here, no
26 such consent has been proffered or even predicted.

27 The Court notes that the State Attorneys General have filed an Administrative Motion to file
28 supplemental information that Meta has recently served an intent to issue subpoenas to various state

1 agencies, including the Maine the Maine Department of Education and the Maine Department of
2 Health & Human Services. [Dkt. 1031-4 at 550–633]. Significantly, the Maine Attorney General
3 has confirmed that its office will definitely represent all of the state agencies at issue if Meta were
4 to serve those agencies with a subpoena in this matter. [Dkt. 738-1 at 15]. Accordingly, it appears
5 that under the statutory scheme each agency will be represented by the Maine Attorney General in
6 this matter for discovery. *See* Me. Rev. Stat. tit. 5, § 191(3). Thus, because the Maine Attorney
7 General will likely be involved in representing these state agencies in any event in this case, whether
8 to respond to subpoenas or to respond to party discovery.

9 Further, there is no statutory, legal, or administrative rule cited which prohibits the Maine
10 Attorney General from accessing the documents of the state agencies at issue for purposes of
11 discovery. The absence of a general statute that authorizes the Maine Attorney General to access
12 all Maine agencies’ documents does not, by itself, mandate a conclusion that the Maine Attorney
13 General lacks control, for the purposes of discovery, of the documents of the listed Maine agencies.
14 The Maine Attorney General’s argument that the absence of a statute denying “control of agency
15 documents cannot equate to a conclusion that he [the Maine Attorney General] does have such
16 control” misconstrues the legal control test – the absence or existence of a statute is not by itself
17 “equating to a conclusion” or outcome determinative. To the extent a statute exists or is lacking is,
18 however, a factor for the Court to consider, along with the other factors discussed herein.

19 With regard to statutory authorization to access documents, the situation in Maine is not as
20 simplistic as the Maine Attorney General posits. First, the Maine Attorney General admits that
21 agencies are sometimes expressly required by local law to provide records to the Attorney General.
22 Dkt. 738-16 at 2 (citing Me. Rev. Stat. tit. 9-B, § 226(2)). Indeed, the cited statute requires the
23 Maine Superintendent of Financial Institutions to disclose information upon written request by the
24 Maine Attorney General. *See* Me. Rev. Stat. tit. 9-B, § 226(2). The Maine Attorney General’s
25 argument that “[c]ertain documents maintained by these agencies are confidential by statute”
26 incorrectly equates “confidentiality” with a restriction on the Attorney General’s right to access
27 these documents as counsel for the agencies at issue. Dkt. 738-16 at 2 (citing Me. Rev. Stat. tit. 22,
28 § 4008)). First, this cited statute relates to the Maine Department of Health and Human Services,

1 and thus is inapplicable to any of the other state agencies at issue. *See* Me. Rev. Stat. tit. 22, § 1-A.
2 Second, the cited statute creates confidentiality restrictions preventing public disclosure of
3 documents containing a child’s personally identifying information in connection child protective
4 activities and when a child is in the custody or care of that department. Me. Rev. Stat. Title 22,
5 § 4008(1). Finally, and contrary to the Maine Attorney General’s argument, the cited statute
6 specifically states that these records “are available” to “legal counsel for the department” and thus
7 the cited statute actually provides the Maine Attorney General an explicit legal right to obtain and
8 access these documents of the Maine Department of Health and Human Services (one of the
9 agencies at issue here) when acting as counsel for that agency. The Court thus finds that Title 22,
10 § 4008(1) directly satisfies *Citric Acid*’s requirement of a showing of a legal right to access the
11 documents of that state agency.

12 The Court recognizes that this is a somewhat unusual situation, in which a law enforcement
13 organization, the attorney general, is both counsel for a party to the case while also acting or able to
14 act as counsel for a third party. However, this would not be the first time that a legal services
15 provider, as counsel for a party, is found to have control over third party documents for purposes of
16 discovery. *See, e.g., Becnel*, 2018 WL 691649, at *4 (“Both Salas individually and his law firm,
17 the subpoena recipients and defendants in this court, are counsel of record for the Salas defendants
18 in the Florida lawsuit Thus, a Rule 34 request for production to Salas in the Florida lawsuit
19 required Salas to respond as to responsive materials over which Salas and his law firm had
20 possession, custody or control.”). Indeed, one court has noted that “[i]n general, an attorney is
21 presumed to have control over documents in its client’s possession.” *Perez*, 2014 WL 1796661, at
22 *2. The Court is not holding broadly that there must be a finding of a legal right of access to and
23 thus control over third party client documents in every case involving a legal services provider as a
24 party; rather, under the particular facts here, and under the totality of circumstances viewed in light
25 of applicable legal standards, the Court finds that control exists here.

26 The Maine Attorney General’s likely role as counsel for the agencies at issue would
27 inherently involve obtaining necessary documents for effective representation in litigation. In acting
28 as counsel, the Maine Attorney General would necessarily have access to and thus control over the

1 relevant documents needed to respond to discovery requests. *See Monsanto*, 2023 WL 4083934, at
2 *5–6 (finding state Attorney General has control over agency documents “based on his broad
3 statutory and common law powers to control and manage legal affairs on behalf of state agencies,
4 has a legal right to obtain responsive documents from the state agencies referenced in the
5 Complaint”).

6 To the extent the Maine Attorney General argues that the Maine Attorney General “has a
7 unique role in Maine government, distinct from the executive branch,” *see* *dk.* 738-16 at 2, that
8 argument misapprehends the “legal control” test for documents – the issue is not simply whether
9 one entity is under the day-to-day operational control of the other (such as a parent-wholly-owned-
10 subsidiary relationship), and not simply whether the two entities are legally separate (such as two
11 different and separately incorporated entities), but rather whether there is a legal right to obtain the
12 documents as explained by *Citric Acid*. While the Maine Attorney General is a separate entity and
13 brought the instant action in the exercise of “independent authority,” *dk.* 738-16 at 2, that fact alone
14 does not outweigh the implications flowing from the fact that the Maine Attorney General will act
15 as the agencies’ counsel. “‘The control analysis for Rule 34 purposes does not require the party to
16 have actual managerial power over the foreign corporation, but rather that there be close
17 coordination between them.’” *St. Jude Medical S.C., Inc.*, 305 F.R.D. at 638. Here, the attorney-
18 client relationship between the state Attorney General and the state agencies (a relationship
19 mandated by state law) necessitates close coordination. While operational control may be a factual
20 situation which demonstrates a legal right to obtain the documents, the absence of such “executive
21 or functional control” is not determinative for evaluating “control” for purposes of discovery. By
22 definition, the “legal control” issue for discovery arises when there are two legally distinct or
23 separate entities – otherwise, if only one entity were involved, there would be no dispute that party
24 discovery covered that one entity. As discussed above, courts have found “control” for purposes of
25 discovery where a party is clearly not in managerial control over the third-party, such as a subsidiary
26 having control over the documents of a parent corporation, or an individual government officer
27 having control over the documents of an entire agency. Thus, arguing that “the agencies that Meta
28 has identified are administered by the Governor or officials she appoints. The autonomy of the

1 [Maine] Attorney General from these officials and agencies is well-settled,” dkt. 738-14 at 2, is
2 simply re-stating the issue to be decided, and not determinative of the issue. The Maine Attorney
3 General’s arguments erroneously conflate the legal control issue with “operational control” or
4 “functional independence” of each entity, and thus is insufficient to rebut a finding of legal control
5 of the documents for purposes of discovery.

6 The Maine Attorney General’s argument that “[w]hen acting as counsel to an agency, he
7 [the Maine Attorney General] has no more legal control of client documents than Meta’s lawyers
8 have of Meta’s documents,” is a variation on the argument rejected above (such as in the discussion
9 of this issue with regard to California) that lawyers are somehow helpless or absolved of all duty to
10 supervise and, if necessary, directly obtain documents from clients for discovery. *Id.* Contrary to
11 the Maine Attorney General’s argument “[i]n general, an attorney is presumed to have control over
12 documents in its client’s possession.” *Perez*, 2014 WL 1796661, at *2. The Federal Rules of Civil
13 Procedure contemplate and require that counsel take proactive steps, without the need for constant
14 court intervention, to comply with and collaborate on discovery, including taking appropriate steps
15 to collect (or supervise the collection) of documents from clients. The system for rational and
16 reasonable discovery and disclosures under the Federal Rules would fall apart if lawyers were
17 simply relieved of any legal duty or obligations to obtain documents for production in discovery
18 from their clients. As discussed above, that legal duty is jurally related to and logically another facet
19 of a legal right to obtain documents. Here, where the law requires the state Attorney General to
20 represent the agencies at issue (and where the state Attorney General has confirmed that
21 representation in this matter), there is no basis to avoid those obligations and their attendant legal
22 rights.

23 Finally, the Court has recognized that the issue of control of state agency documents, when
24 a State or State Attorney General is a party, has been litigated and decided in a previous Multi-
25 District Litigation involving most of the same States and State Attorneys General as are involved in
26 this case. *Generic Pharmaceuticals (II)*, 699 F. Supp. 3d at 357–58. The *Generic Pharmaceuticals*
27 *(II)* opinion not only ruled against the objecting States, but also helpfully identified numerous States
28 which withdrew their objections to party discovery and negotiated a resolution of this issue with the

opposing party there. *Id.* at 356 n.5. In that case, Maine is identified as one of the States which reached agreement on the state agency control issue without requiring that court to expend resources resolving the dispute there. *Id.* Given that the *Generic Pharmaceuticals (II)* opinion resolved the control issue against all the remaining objecting states and given that Maine was able to reach a negotiated resolution of the dispute in that Multi-District Litigation, this Court is disappointed that the Maine Attorney General and Meta were unable to reach a negotiated resolution of this dispute. As the Court has repeatedly encouraged the Parties at multiple Discovery Management Conferences, they should make every effort to work out discovery disputes through reasonable, good faith negotiations between able and experienced counsel, particularly where, as here, there is guidance in precedent on the discovery issue at hand.

XVI. MARYLAND

In opposition to the control issue, the Maryland Attorney General argues primarily the following factors: (1) the Maryland Attorney General is a separate entity and independent from the Maryland agencies; (2) the Maryland Attorney General brought the lawsuit under its own independent law enforcement capacity; and (3) the Maryland Attorney General would have to utilize public channels in order to obtain documents from the Maryland agencies, which does not amount to control over the Maryland agencies' documents. [Dkt. 738-17 at 2].

In support of a finding of control with regard to these state agencies' documents, Meta argues primarily that Maryland agencies are proscriptively barred from obtaining counsel other than the Maryland Attorney General without Maryland Attorney General approval – with few exceptions not relevant to the listed Maryland agencies. *Id.* at 3. Here, Meta seeks discovery from the following agencies: Center for School Safety, Department of Budget and Management, Department of Commerce, Department of Health, Department of Human Services, Governor's Office, Higher Education Commission, and State Department of Education. *Id.*

After considering the factors argued in the briefs, the Court finds that the factors weigh in favor of a finding that the Maryland Attorney General has legal control, for purposes of discovery, over the Maryland agencies in dispute. While the Maryland Attorney General is a separate entity and while the Maryland Attorney General does bring the instant action exercising its own

independent authority, this does not outweigh the fact that the Maryland Attorney General will act as the agencies' counsel. First, the Maryland "Attorney General has general charge of the legal business of the State." Md. Code, State Gov't § 6-106(a). Second, the statutory scheme in Maryland requires that "[t]he Attorney General is the legal adviser of and *shall* represent and otherwise perform *all of the legal work* for each officer and *unit of the State government*." Md. Code, State Gov't § 6-106(b) (emphasis added). Specific Maryland statutory schemes for agencies echo and reinforce that the Maryland Attorney General is the legal representative for each of those agencies, including agencies at issue here. *See e.g.*, Md. Code, Health-Gen. § 2-107 ("The Attorney General is legal adviser to the Department [of Health]."); Md. Code, Econ. Dev. § 2-116 (Department of Commerce); Md. Code, Human Serv. § 2-208 (Department of Human Services). The Maryland Constitution makes clear that the Governor is also to be represented by the Maryland Attorney General. Md. Const. art. 5, § 3(d) ("The Governor may not employ additional counsel [other than the Maryland Attorney General], in any case whatever, unless authorized by the General Assembly.").

Importantly, the Maryland Attorney General's arguments do not negate the fact that (unlike other states) there is no cited law or statute which empowers any of the Maryland agencies at issue here to employ or obtain counsel in this matter other than the Attorney General absent consent. [Dkt. 738-13 at 2]. Agencies in Maryland may not employ other counsel without the Maryland Attorney General's approval, and there is no such approval in the record. Md. Code, State Gov't § 6-106(c). The Court notes that the State Attorneys General have filed an Administrative Motion to file supplemental information that Meta has recently served an intent to issue subpoenas to various state agencies, including the Maryland Center for School Safety and the Maryland Department of Human Services. [Dkt. 1031-4 at 634–717]. Neither of these state agencies are allowed to employ legal counsel other than the Maryland Attorney General absent consent and thus by statute each will likely be represented by the Maryland Attorney General in this matter for discovery. *See* Md. Code, State Gov't. § 6-106(c). This arrangement indicates strongly that the state Attorney General, in fulfilling its role as the legal adviser of each unit of the State government, would necessarily and inherently have access to and control over the necessary documents for effective legal representation

1 of these state agencies. Therefore, the Court concludes that the Maryland Attorney General has
2 legal control, for the purposes of discovery, over the documents held by the Maryland agencies
3 listed by Meta, including in particular the three agencies recently listed in the intent to issue
4 subpoenas.

5 Indeed, the Maryland Attorney General confirmed that its office could represent all of the
6 Maryland agencies at issue if Meta were to serve those agencies with a subpoena in this matter.
7 [Dkt. 738-1 at 15–16]. Accordingly, it appears that under the statutory scheme each agency will
8 likely be represented by the Maryland Attorney General in this matter for discovery. *See* Md. Code,
9 State Gov’t. § 6-106. Thus, because the Maryland Attorney General will likely be involved in
10 representing these state agencies in any event in this case, whether to respond to subpoenas or to
11 respond to party discovery.

12 Relatedly, the Maryland Attorney General has taken the position that communications
13 between the Maryland Attorney General and these state agencies would be covered by the attorney-
14 client privilege if such agencies are represented by the Maryland Attorney General. [Dkt. 738-17
15 at 2]. To the extent that the Maryland Attorney General has attempted to subdivide its own office
16 between the enforcement team in this case and other attorneys within the Office of the State Attorney
17 General in order to somehow argue that the scope of attorney-client privilege is limited only to some
18 parts of the State Attorney General’s office but not to other teams, that argument is not supported
19 by citation to law and is contrary to the weight of legal authority. *Id.* at 2 n.2. The scope of attorney-
20 client relationship (and the duties flowing therefrom, including the scope of the attendant attorney-
21 client privilege) encompasses the entirety of a legal services organization due to well-known rules
22 of imputation of confidences to a legal services organization, including a public law office. *See,*
23 *e.g., People ex rel. Peters*, 951 P.2d at 930 (“When an attorney associates with a law firm, the
24 principle of loyalty to the client extends beyond the individual attorney and applies with equal force
25 to the other attorneys practicing in the firm. This principle, known as the ‘rule of imputed
26 disqualification,’ . . . requires disqualification of all members of a law firm when any one of them
27 practicing alone would be disqualified because of a conflict of interest The rule of imputed
28 disqualification applies to both private firms and public law firms such as a district attorney’s office

or the office of the state public defender.”); accord *City of Cnty. of Denver*, 37 P.3d at 457; see also *Kirk*, 108 Cal. Rptr. 3d at 637–38, 642 (“We do not doubt that vicarious disqualification is the general rule, and that we should presume knowledge is imputed to all members of a tainted attorney’s law firm. However, we conclude that, in proper circumstances, the presumption is a rebuttable one[.]” The court recognizing presumption of imputed knowledge in the context of government attorneys, which presumption could be rebutted by proper ethical screening); cf. also *Billings*, 441 S.E.2d at 266 (because individual government lawyer at issue “should be screened from any direct or indirect participation in the matter,” vicarious disqualification of entire office denied); cf. also *Calhoun*, 492 S.W.3d at 137 (individual lawyer disqualified when joining prosecutors’ office but “the entire office in which that attorney works is not disqualified as long as the disqualified attorney is appropriately screened. Disqualification of the entire prosecuting office is not necessary absent special facts, such as a showing of actual prejudice; or, perhaps the screening procedures are ineffective.”). Some jurisdictions treat public legal service organizations like private law firms and impute shared confidences among lawyers of the entire public law entity. Even in jurisdictions which do not automatically impute disqualification, and shared confidences, to an entire public law office, those courts recognize that ethical screening or other procedures are required out of recognition that actual (as opposed to imputed) sharing of confidences may occur and such procedures are required to avoid dissemination of attorney-client privileged communications within an entire public law organization. This review of case law demonstrates that no courts support the Maryland Attorney General’s argument that different individual lawyers in the Maryland Attorney General’s office have *ex ante* separable, discrete attorney-client relationships.

The Court rejects the Maryland Attorney General’s attempt to simultaneously disclaim the existence of an attorney-client privilege as between the “team” of attorneys currently working on this case, while apparently attempting to preserve the ability to assert that the privilege applies to communications between other lawyers in the Maryland Attorney General’s Office and these agencies. “[T]o the extent that [the State] asserts an attorney-client privilege with these legislators, it does so solely in their official capacities [I]t is inconsistent for the State to argue

1 that on one hand the [State] Attorney General represents these individuals, but that for discovery
2 purposes the [Plaintiff] United States must resort to Federal Rule of Civil Procedure 45.” *Perez*,
3 2014 WL 1796661, at *2. To the extent the Maryland Attorney General is asserting that the
4 attorney-client privilege would apply to communications between the Maryland Attorney General’s
5 office and the agencies at issue, that further supports the conclusion of control here. Assertion of
6 the attorney-client privilege requires, as a prerequisite, the existence of an attorney-client
7 relationship. *See Graf*, 610 F.3d at 1156. Just as the *Perez* Court rejected the inconsistent approach
8 to privilege there, here the Maryland Attorney General argues that “[t]he [Maryland Attorney
9 General] attorneys that are counsel to independent state agencies are distinct from the [Maryland
10 Attorney General] attorneys who are working on the instant matter. The [Maryland Attorney
11 General] attorneys comprising the enforcement team do not have an attorney-client relationship with
12 any independent state agencies.” [Dkt 738-18 at 2 n.2]. The Maryland Attorney General’s attempt
13 to preserve the ability to assert the attorney-client privilege between the Maryland Attorney
14 General’s office and the agencies at issue further supports the conclusion of control. It is illusory
15 to argue that individual attorneys within the Maryland Attorney General’s office have their own
16 separate attorney-client relationships with the state agencies. The Maryland Attorney General has
17 already confirmed that their office could do so for discovery in this matter. [Dkt. 738-1 at 13].
18 Assertion of the attorney client privilege requires, as a prerequisite, the existence of an attorney-
19 client relationship and here the individual attorneys within the Maryland Attorney General’s office
20 are not treated like solo practitioners.

21 Further, there is no statutory, legal, or administrative rule cited which prohibits the Maryland
22 Attorney General from accessing the documents of the state agencies at issue for purposes of
23 discovery. The Maryland Attorney General’s argument that the Maryland Attorney General must
24 use either the Maryland Public Information Act, Md. Code, Gen. Prov. §§ 4-101 through 4-601, or
25 a subpoena to obtain documents from state agencies who are their client is not a credible
26 interpretation of the Maryland Public Information Act – there is no citation that a public records
27 request is the only way for the Maryland Attorney General to get documents from state agencies
28 they are representing in litigation. [Dkt. 738-8 at 2]. If the Maryland Attorney General were correct,

1 then the Maryland Attorney General would have to submit a Public Information Act request every
2 time they represent a state agency, to get documents from its own client - which is not merely
3 impractical and not believable but also contrary to the principles of effective legal representation.
4 As counsel, the Maryland Attorney General will have the normal type of direct access to the
5 necessary documents from its own clients, without resorting to public channels, ensuring efficient
6 and comprehensive legal support for the agencies involved. The Maryland Public Information Act
7 is not an impediment to that access, because that Act only applies to records which are to be
8 produced for public inspection (and not for purposes of litigation such as this case in which there is
9 a Protective Order limiting public availability of confidential documents). Md. Code, Gen. Prov. §
10 4-103. Further, the Maryland Public Information Act nowhere states that this statute is the only
11 means by which the Maryland Attorney General can obtain records from other state agencies – the
12 statute merely sets up a permissive system for public inspection, not a restriction or limitation on
13 access. Indeed, the Maryland Attorney General has cited no precedent requiring the Maryland
14 Attorney General to use either a Public Information Act request or a subpoena to obtain documents
15 from state agencies represented in litigation by the Maryland Attorney General. The Court finds
16 this argument to be wholly unpersuasive. Finally, the argument that there is no statute specifically
17 authorizing the Maryland Attorney General to obtain documents from state agencies assumes an
18 overly restrictive view of the control test for documents. [Dkt. 738-17 at 2]. To the contrary, courts
19 have recognized that control for purposes of document discovery is liberally construed. *E.g.*,
20 *Miniace*, 2006 WL 335389, at *1; *Evans*, 2010 WL 1136216, at *1–2; *Inland Concrete Enterprises,*
21 *Inc.*, 2011 WL 13209239, at *3–4.

22 The Maryland Attorney General’s role as counsel for the agencies at issue inherently
23 involves obtaining necessary documents for effective representation in litigation. In acting as
24 counsel, the Maryland Attorney General would necessarily have access to and thus control over the
25 relevant documents needed to respond to discovery requests. *See Monsanto*, 2023 WL 4083934, at
26 *5–6 (finding state Attorney General has control over agency documents “based on his broad
27 statutory and common law powers to control and manage legal affairs on behalf of state agencies,
28 has a legal right to obtain responsive documents from the state agencies referenced in the

Complaint”). To the extent the Maryland Attorney General argues that “the [Maryland] Attorney General has no control over the state agencies previously identified by Meta, as typically, Maryland state agencies are part of the Executive Department and they report to the Governor,” *see* dkt. 738-17 at 2, that argument misapprehends the “legal control” test for documents – the issue is not simply whether one entity is under the day-to-day operational control of the other (such as a parent-wholly-owned-subsidiary relationship), and not simply whether the two entities are legally separate (such as two different and separately incorporated entities), but rather whether there is a legal right to obtain the documents as explained by *Citric Acid*. ““The control analysis for Rule 34 purposes does not require the party to have actual managerial power over the foreign corporation, but rather that there be close coordination between them.”” *St. Jude Medical S.C., Inc.*, 305 F.R.D. at 638. Here, the attorney-client relationship between the state Attorney General and the state agencies (a relationship mandated by state law) necessitates close coordination. While operational control may be a factual situation which demonstrates a legal right to obtain the documents, the absence of such “executive or functional control” is not determinative for evaluating “control” for purposes of discovery. By definition, the “legal control” issue for discovery arises when there are two legally distinct or separate entities – otherwise, if only one entity were involved, there would be no dispute that party discovery covered that one entity. As discussed above, courts have found “control” for purposes of discovery where a party is clearly not in managerial control over the third-party, such as a subsidiary having control over the documents of a parent corporation, or an individual government officer having control over the documents of an entire agency. *See, e.g., Diven v. Souders*, No. 1:21-CV-01276-BAH, 2024 WL 184345, at *3 (D. Md. Jan. 17, 2024) (finding named defendants (correctional officers) have control over documents of Maryland Department of Public Safety & Correctional Services). Thus, arguing that the Maryland “Attorney General and the Governor are separate constitutional officers,” dkt. 738-17 at 2, is simply re-stating the issue to be decided, and not determinative of the issue. The Maryland Attorney General’s arguments erroneously conflate the legal control issue with “operational control” or “functional independence” of each entity, and thus is insufficient to rebut a finding of legal control of the documents for purposes of discovery.

1 Finally, the Maryland Attorney General does not cite any statutory or legal prohibition on
2 the Maryland Attorney General's representing the state agencies in this matter for purposes of
3 discovery. The Court recognizes that this is a somewhat unusual situation, in which a law
4 enforcement organization, the attorney general, is both a party to the case while also acting or able
5 to act as counsel for a third party. However, this would not be the first time that a legal services
6 provider, as a party, is found to have control over third party documents for purposes of discovery.
7 *See, e.g., Becnel*, 2018 WL 691649, at *4 ("Both Salas individually and his law firm, the subpoena
8 recipients and defendants in this court, are counsel of record for the Salas defendants in the Florida
9 lawsuit Thus, a Rule 34 request for production to Salas in the Florida lawsuit required Salas
10 to respond as to responsive materials over which Salas and his law firm had possession, custody or
11 control."). Indeed, one court has noted that "[i]n general, an attorney is presumed to have control
12 over documents in its client's possession." *Perez*, 2014 WL 1796661, at *2. The Court is not
13 holding broadly that there must be a finding of a legal right of access to and thus control over third
14 party client documents in every case involving a legal services provider as a party; rather, under the
15 particular facts here, and under the totality of circumstances viewed in light of applicable legal
16 standards, the Court finds that control exists here.

17 **XVII. MICHIGAN**

18 In opposition to the control issue, the Michigan Attorney General argues primarily the
19 following factors: (1) the Michigan Attorney General is a separate entity and independent from the
20 Michigan agencies; and (2) the Michigan Attorney General brought the lawsuit under its own
21 independent law enforcement capacity. [Dkt. 738-18 at 2].

22 In support of a finding of control with regard to these state agencies' documents, Meta argues
23 primarily that the Michigan Attorney General must act as counsel for the Michigan agencies. *Id.* at
24 3. Here, Meta seeks discovery from the following agencies: Department of Education, Department
25 of Health and Human Services, Department of Labor and Economic Opportunity, Department of
26 Lifelong Education, Advancement, and Potential, Executive Office of the Governor, and State
27 Budget Office. *Id.*

28 After considering the factors argued in the briefs, the Court finds that the factors weigh in

1 favor of a finding that the Michigan Attorney General does have legal control, for purposes of
 2 discovery, over the listed Michigan agencies. While the Michigan Attorney General is a separate
 3 entity and while the Michigan Attorney General does bring the instant action exercising its own
 4 independent authority, this does not outweigh the fact that the Michigan Attorney General will act
 5 as the agencies' counsel. First, the Michigan Attorney General admits that "[t]he Attorney General
 6 serves as counsel to the Governor and state agencies." Dkt. 738-17 at 2 (citing Mich. Comp. Laws
 7 § 14.28 ("The attorney general shall prosecute and defend all actions in the supreme court, in which
 8 the state shall be interested, or a party[.]"). Under Michigan's statutory scheme, "the attorney
 9 general shall also, when requested by the governor, or either branch of the legislature, and may,
 10 when in his own judgment the interests of the state require it, intervene in and appear for the people
 11 of this state in any other court or tribunal, in any cause or matter, civil or criminal, in which the
 12 people of this state may be a party or interested." Mich. Comp. Laws § 14.28. As the Michigan
 13 Court of Appeals noted, "[u]nder our scheme of laws, the **attorney general has the duty** as a
 14 constitutional officer possessed with common law as well as statutory powers and duties **to**
 15 **represent** or furnish legal counsel to many interests-the State, **its agencies**, the public interest and
 16 others designated by statute." *Att'y Gen. v. Michigan Pub. Serv. Comm'n*, 625 N.W.2d 16, 29
 17 (Mich. Ct. App. 2000) (quoting *State ex rel. Allain v. Mississippi Pub. Serv. Comm'n*, 418 So. 2d
 18 779, 783 (Miss. 1982)) (emphasis added).

19 Importantly, the Michigan Attorney General's arguments do not negate the fact that (unlike
 20 other states) there is no cited law or statute which empowers any of the Michigan agencies at issue
 21 here to employ or obtain counsel in this matter other than the Attorney General absent consent.
 22 [Dkt. 738-13 at 2]. The Michigan Attorney General has the mandatory duty to defend agencies in
 23 Michigan in all suits relating to matters connected with their departments upon request of the
 24 Governor. Mich. Comp. Laws, § 14.29. Indeed, the Michigan Attorney General confirmed that its
 25 office could represent all of the Michigan agencies at issue if Meta were to serve those agencies
 26 with a subpoena in this matter. [Dkt. 738-1 at 16–17]. Accordingly, it appears that under the
 27 statutory scheme each agency will likely be represented by the Michigan Attorney General in this
 28 matter for discovery. *See* Mich. Comp. Laws, § 14.29. Thus, because the Michigan Attorney

1 General will likely be involved in representing these state agencies in any event in this case, whether
2 to respond to subpoenas or to respond to party discovery.

3 Relatedly, the Michigan Attorney General has taken the position that communications
4 between the Michigan Attorney General and these state agencies are subject to the attorney-client
5 privilege (with no limitations as to time frame). [Dkt. 738-18 at 2]. By definition, an attorney-client
6 relationship is a prerequisite to assertion of the attorney-client privilege. *See Graf*, 610 F.3d at 1156.
7 Thus, the Michigan Attorney General's admission that it has an existing (indeed pre-existing)
8 attorney-client relationship with the agencies at issue lends further support for a finding of a legal
9 right of access and thus control over the documents of these state agencies.

10 The Court recognizes that this is a somewhat unusual situation, in which a law enforcement
11 organization, the attorney general, is both a party to the case while also acting or able to act as
12 counsel for a third party. However, this would not be the first time that a legal services provider, as
13 a party, is found to have control over third party documents for purposes of discovery. *See, e.g.,*
14 *Becnel*, 2018 WL 691649, at *4 (“Both Salas individually and his law firm, the subpoena recipients
15 and defendants in this court, are counsel of record for the Salas defendants in the Florida lawsuit . .
16 . . . Thus, a Rule 34 request for production to Salas in the Florida lawsuit required Salas to respond
17 as to responsive materials over which Salas and his law firm had possession, custody or control.”).
18 Indeed, one court has noted that “[i]n general, an attorney is presumed to have control over
19 documents in its client’s possession.” *Perez*, 2014 WL 1796661, at *2. Here, the Michigan Attorney
20 General admits that “to the extent the Attorney General has any ‘control’ over a listed state agency,
21 it is exclusively in the attorney-client context.” [Dkt. 738-18 at 2]. The Court is not holding broadly
22 that there must be a finding of a legal right of access to and thus control over third party client
23 documents in every case involving a legal services provider as a party; rather, under the particular
24 facts here, and under the totality of circumstances viewed in light of applicable legal standards, the
25 Court finds that control exists here.

26 The Michigan Attorney General’s likely role as counsel for the agencies at issue would
27 inherently involve obtaining necessary documents for effective representation in litigation. In acting
28 as counsel, the Michigan Attorney General would necessarily have access to and thus control over

1 the relevant documents needed to respond to discovery requests. *See Monsanto*, 2023 WL 4083934,
2 at *5–6 (finding state Attorney General has control over agency documents “based on his broad
3 statutory and common law powers to control and manage legal affairs on behalf of state agencies,
4 has a legal right to obtain responsive documents from the state agencies referenced in the
5 Complaint”). To the extent the Michigan Attorney General argues that the “the [Michigan] Attorney
6 General has no relevant authority to direct state agencies’ conduct, all of which conduct falls under
7 the Governor’s constitutionally distinct purview,” *see* dkt. 738-18 at 2, that argument misapprehends
8 the “legal control” test for documents – the issue is not simply whether one entity is under the day-
9 to-day operational control of the other (such as a parent-wholly-owned-subsidiary relationship), and
10 not simply whether the two entities are legally separate (such as two different and separately
11 incorporated entities), but rather whether there is a legal right to obtain the documents as explained
12 by *Citric Acid*. ““The control analysis for Rule 34 purposes does not require the party to have actual
13 managerial power over the foreign corporation, but rather that there be close coordination between
14 them.”” *St. Jude Medical S.C., Inc.*, 305 F.R.D. at 638. Here, the attorney-client relationship
15 between the state Attorney General and the state agencies (a relationship mandated by state law)
16 necessitates close coordination. While operational control may be a factual situation which
17 demonstrates a legal right to obtain the documents, the absence of such “executive or functional
18 control” is not determinative for evaluating “control” for purposes of discovery. By definition, the
19 “legal control” issue for discovery arises when there are two legally distinct or separate entities –
20 otherwise, if only one entity were involved, there would be no dispute that party discovery covered
21 that one entity. As discussed above, courts have found “control” for purposes of discovery where a
22 party is clearly not in managerial control over the third-party, such as a subsidiary having control
23 over the documents of a parent corporation, or an individual government officer having control over
24 the documents of an entire agency. *See Williams*, 2022 WL 22859198, at *2 (finding named
25 defendants, corrections officers, have control over third-party agency Michigan Department of
26 Correction (MDOC) documents, noting that: “Here, Defendants are represented by the Michigan
27 Attorney General, which has demonstrated access to [third-party agency] MDOC documents and
28 materials in many cases before this Court.”). Thus, arguing that “the [Michigan] Governor—and

1 the agencies she oversees—are not under the [Michigan] Attorney General’s authority,” dkt. 738-
2 18 at 2, is simply re-stating the issue to be decided, and not determinative of the issue. The Michigan
3 Attorney General’s arguments erroneously conflate the legal control issue with “operational
4 control” or “functional independence” of each entity, and thus is insufficient to rebut a finding of
5 legal control of the documents for purposes of discovery.

6 Indeed, at least one other federal court has previously found that the Michigan Attorney
7 General has legal control over Michigan state agency materials. *Generic Pharmaceuticals (II)*, 699
8 F. Supp. 3d at 357–58. While this Court reaches its own independent conclusions consistent with
9 the applicable legal standards discussed above and in light of the facts and circumstances presented
10 here, the analysis in the *Generic Pharmaceuticals (II)* Multi-District Litigation is certainly
11 consistent with, and to that extent further persuasively supports, the conclusion here with regard to
12 the Michigan Attorney General’s having control with regard to documents of the state agencies at
13 issue. Given that the *Generic Pharmaceuticals (II)* opinion resolved the control issue against all the
14 objecting states including Michigan, this Court is disappointed that the Michigan Attorney General
15 and Meta were unable to reach a negotiated resolution of this dispute, which other states were able
16 to do in *Generic Pharmaceuticals (II)*. As the Court has repeatedly encouraged the Parties at
17 multiple Discovery Management Conferences, they should make every effort to work out discovery
18 disputes through reasonable, good faith negotiations between able and experienced counsel,
19 particularly where, as here, there is guidance in precedent on the discovery issue at hand.

20 **XVIII. MINNESOTA**

21 In opposition to the control issue, the Minnesota Attorney General argues primarily the
22 following factors: (1) the Minnesota Attorney General is a separate entity and independent from the
23 Minnesota agencies; (2) the Minnesota Attorney General brought the lawsuit under its own
24 independent law enforcement capacity; (3) the Minnesota agencies would create a “virtual veto”
25 over the Minnesota Attorney General’s independent responsibilities to bring enforcement actions;
26 (4) the Minnesota agencies are not required to use the Minnesota Attorney General as legal counsel;
27 (5) Minnesota agencies are statutorily responsible for maintaining, preserving, retaining, and
28 providing access to its own records; (6) the Minnesota Attorney General may not be able to obtain non-

1 public data from Minnesota agencies unless specifically authorized by statute or federal law; and
 2 (7) the Minnesota Attorney General would have to utilize public channels in order to obtain
 3 documents from the Minnesota agencies. [Dkt. 738-19 at 2].

4 In support of a finding of control with regard to these state agencies' documents, Meta argues
 5 primarily that Minnesota agencies are proscriptively barred from obtaining counsel other than the
 6 Minnesota Attorney General without consent from the Minnesota Governor or if the Minnesota
 7 Attorney General is an adverse party. *Id.* at 3. Here, Meta seeks discovery from the following
 8 agencies: Department of Commerce, Department of Health, Department of Human Services,
 9 Education Department, Employment and Economic Development Department, Governor's Office,
 10 Office of Higher Education, and Department of Management and Budget. *Id.*

11 The Court finds that the Minnesota Attorney General has control, for the purposes of
 12 discovery, of the listed Minnesota agencies. While the Minnesota Attorney General is a separate
 13 entity and while the Minnesota Attorney General does bring the instant action exercising its own
 14 independent authority, this does not outweigh the fact that the Minnesota Attorney General will act
 15 as the agencies' counsel. Under Minnesota's statutory scheme, "[t]he attorney general **shall** act as
 16 the attorney for all state officers and **all boards or commissions** created by law in all matters
 17 pertaining to their official duties." Minn. Stat. § 8.06 (emphasis added). Minnesota law requires
 18 that "[t]he attorney general **shall appear** for the state in all causes in the supreme and **federal courts**
 19 wherein the state is directly interested." Minn. Stat. § 8.01 (emphasis added). Absent exceptions
 20 which are not present or shown to exist here, "no additional counsel shall be employed and the legal
 21 business of the state shall be performed exclusively by the attorney general and the attorney
 22 general's assistants." *Id.*

23 Importantly, the Minnesota Attorney General's arguments do not negate the fact that (unlike
 24 other states) there is no cited law or statute which empowers any of the Minnesota agencies at issue
 25 here to employ or obtain counsel in this matter other than the Attorney General absent consent.
 26 [Dkt. 738-13 at 2]. Even in exceptional circumstances where different counsel may be employed,
 27 "the **attorney general** shall thereupon be authorized to employ such counsel" and not the agencies.
 28 Minn. Stat. § 8.06 (emphasis added). Indeed, the Minnesota Attorney General confirmed that its

1 office could represent all of the Minnesota agencies at issue if Meta were to serve those agencies
2 with a subpoena in this matter. [Dkt. 738-1 at 17–18]. Accordingly, it appears that under the
3 statutory scheme each agency will likely be represented by the Minnesota Attorney General in this
4 matter for discovery. *See* Minn. Stat. §§ 8.01, 8.06. Thus, because the Minnesota Attorney General
5 will likely be involved in representing these state agencies in any event in this case, whether to
6 respond to subpoenas or to respond to party discovery.

7 Relatedly, the Minnesota Attorney General has taken the position that, “to the extent a
8 separate division” of the Attorney General’s office “may be engaged by an agency,”
9 communications between the Minnesota Attorney General and these state agencies are subject to
10 the attorney-client privilege. [Dkt. 738-19 at 2]. To the extent the Minnesota Attorney General has
11 attempted to subdivide its own office between the “CP Section” of attorneys currently prosecuting
12 this case and other attorneys within the state Attorney General in order to somehow argue that the
13 scope of attorney-client privilege is limited only as to some parts of the state Attorney General’s
14 office but not other teams, that argument is not supported by citation to law and is contrary to the
15 weight of law. *Id.* The scope of attorney-client relationship (and the duties flowing therefrom,
16 including the scope of the attendant attorney-client privilege) encompasses the entirety of a legal
17 services organization due to well-known rules of imputation of confidences to a legal services
18 organization, including a public law office. *See, e.g., People ex rel. Peters*, 951 P.2d at 930 (“When
19 an attorney associates with a law firm, the principle of loyalty to the client extends beyond the
20 individual attorney and applies with equal force to the other attorneys practicing in the firm. This
21 principle, known as the ‘rule of imputed disqualification,’ . . . requires disqualification of all
22 members of a law firm when any one of them practicing alone would be disqualified because of a
23 conflict of interest The rule of imputed disqualification applies to both private firms and public
24 law firms such as a district attorney’s office or the office of the state public defender.”); *accord City*
25 *of Cnty. of Denver*, 37 P.3d at 457; *see also Kirk*, 108 Cal. Rptr. 3d at 637–38, 642 (“We do not
26 doubt that vicarious disqualification is the general rule, and that we should presume knowledge is
27 imputed to all members of a tainted attorney’s law firm. However, we conclude that, in proper
28 circumstances, the presumption is a rebuttable one[.]” The court recognizing presumption of

1 imputed knowledge in the context of government attorneys, which presumption could be rebutted
2 by proper ethical screening); *cf. also Billings*, 441 S.E.2d at 266 (because individual government
3 lawyer at issue “should be screened from any direct or indirect participation in the matter,” vicarious
4 disqualification of entire office denied); *cf. also Calhoun*, 492 S.W.3d at 137 (individual lawyer
5 disqualified when joining prosecutors’ office but “the entire office in which that attorney works is
6 not disqualified as long as the disqualified attorney is appropriately screened. Disqualification of
7 the entire prosecuting office is not necessary absent special facts, such as a showing of actual
8 prejudice; or, perhaps the screening procedures are ineffective.”). Some jurisdictions treat public
9 legal service organizations like private law firms and impute shared confidences among lawyers of
10 the entire public law entity. Even in jurisdictions which do not automatically impute
11 disqualification, and shared confidences, to an entire public law office, those courts recognize that
12 ethical screening or other procedures are required out of recognition that actual (as opposed to
13 imputed) sharing of confidences may occur and such procedures are required to avoid dissemination
14 of attorney-client privileged communications within an entire public law organization. This review
15 of case law demonstrates that no courts support the Minnesota Attorney General’s argument that
16 different individual lawyers in the Minnesota Attorney General’s office have *ex ante* separable,
17 discrete attorney-client relationships.

18 The Court rejects the Minnesota Attorney General’s attempt to simultaneously disclaim the
19 existence of an attorney-client privilege as between the “team” of attorneys currently working on
20 this case, while apparently attempting to preserve the ability to assert that the privilege applies to
21 communications between other lawyers in the Minnesota Attorney General’s Office and these
22 agencies. “[T]o the extent that [the State] asserts an attorney-client privilege with these
23 legislators, it does so solely in their official capacities [I]t is inconsistent for the State to argue
24 that on one hand the [State] Attorney General represents these individuals, but that for discovery
25 purposes the [Plaintiff] United States must resort to Federal Rule of Civil Procedure 45.” *Perez*,
26 2014 WL 1796661, at *2. To the extent the Minnesota Attorney General is asserting that the
27 attorney-client privilege would apply to communications between the Minnesota Attorney General’s
28 office and the agencies at issue, that further supports the conclusion of control here. Assertion of

1 the attorney-client privilege requires, as a prerequisite, the existence of an attorney-client
2 relationship. *See Graf*, 610 F.3d at 1156. Just as the Court in *Perez* rejected the inconsistent
3 approach to privilege there, here the Minnesota Attorney General argues that “[t]o the extent a
4 separate [Minnesota Attorney General] division (walled-off from the CP Section) may be engaged
5 by an agency to provide legal services, communications between the agency and that separate
6 [Minnesota Attorney General] division would likely be privileged.” [Dkt 738-19 at 2]. The
7 Minnesota Attorney General’s attempt to preserve the ability to assert the attorney-client privilege
8 between the Minnesota Attorney General’s office and the agencies at issue further supports the
9 conclusion of control here. Here, it is illusory to argue that sub-teams attorneys within the
10 Minnesota Attorney General’s office have their own separate attorney-client relationships with the
11 state agencies. The Minnesota Attorney General has already confirmed that their office could
12 represent these agencies for discovery in this matter. [Dkt. 738-1 at 13]. Assertion of the attorney-
13 client privilege requires, as a prerequisite, the existence of an attorney-client relationship. *See Graf*,
14 610 F.3d at 1156.

15 The Court recognizes that this is a somewhat unusual situation, in which a law enforcement
16 organization, the attorney general, is both a party to the case while also acting or able to act as
17 counsel for a third party. However, this would not be the first time that a legal services provider, as
18 a party, is found to have control over third party documents for purposes of discovery. *See, e.g.,*
19 *Becnel*, 2018 WL 691649, at *4 (“Both Salas individually and his law firm, the subpoena recipients
20 and defendants in this court, are counsel of record for the Salas defendants in the Florida lawsuit . .
21 . . Thus, a Rule 34 request for production to Salas in the Florida lawsuit required Salas to respond
22 as to responsive materials over which Salas and his law firm had possession, custody or control.”).
23 Indeed, one court has noted that “[i]n general, an attorney is presumed to have control over
24 documents in its client’s possession.” *Perez*, 2014 WL 1796661, at *2. Here, the Minnesota
25 Attorney General admits that “to the extent the Attorney General has any ‘control’ over a listed state
26 agency, it is exclusively in the attorney-client context.” [Dkt. 738-18 at 2]. The Court is not holding
27 broadly that there must be a finding of a legal right of access to and thus control over third party
28 client documents in every case involving a legal services provider as a party; rather, under the

1 particular facts here, and under the totality of circumstances viewed in light of applicable legal
2 standards, the Court finds that control exists here.

3 The Minnesota Attorney General’s likely role as counsel for the agencies at issue would
4 inherently involve obtaining necessary documents for effective representation in litigation. In acting
5 as counsel, the Minnesota Attorney General would necessarily have access to and thus control over
6 the relevant documents needed to respond to discovery requests. *See Monsanto*, 2023 WL 4083934,
7 at *5–6 (finding state Attorney General has control over agency documents “based on his broad
8 statutory and common law powers to control and manage legal affairs on behalf of state agencies,
9 has a legal right to obtain responsive documents from the state agencies referenced in the
10 Complaint”). To the extent the Minnesota Attorney General argues that the “Minnesota’s Governor
11 and [Minnesota Attorney General] operate as independent elected officials under the state
12 constitution,” *see* dkt. 738-19 at 2, that argument misapprehends the “legal control” test for
13 documents – the issue is not simply whether one entity is under the day-to-day operational control
14 of the other (such as a parent-wholly-owned-subsidiary relationship), and not simply whether the
15 two entities are legally separate (such as two different and separately incorporated entities), but
16 rather whether there is a legal right to obtain the documents as explained by *Citric Acid*. ““The
17 control analysis for Rule 34 purposes does not require the party to have actual managerial power
18 over the foreign corporation, but rather that there be close coordination between them.”” *St. Jude*
19 *Medical S.C., Inc.*, 305 F.R.D. at 638. Here, the attorney-client relationship between the state
20 Attorney General and the state agencies (a relationship mandated by state law) necessitates close
21 coordination. While operational control may be a factual situation which demonstrates a legal right
22 to obtain the documents, the absence of such “executive or functional control” is not determinative
23 for evaluating “control” for purposes of discovery. By definition, the “legal control” issue for
24 discovery arises when there are two legally distinct or separate entities – otherwise, if only one entity
25 were involved, there would be no dispute that party discovery covered that one entity. As discussed
26 above, courts have found “control” for purposes of discovery where a party is clearly not in
27 managerial control over the third-party, such as a subsidiary having control over the documents of
28 a parent corporation, or an individual government officer having control over the documents of an

1 entire agency. Thus, arguing that “[o]nly the Governor can compel agencies to act—including
2 searching for and producing documents in their possession, custody, or control—because the
3 [Minnesota] Governor, *not the [Minnesota Attorney General]*, has the authority to appoint agency
4 commissioners who serve at the Governor’s pleasure,” dkt. 738-19 at 2 (emphasis in original), is
5 simply re-stating the issue to be decided, and not determinative of the issue. The Minnesota
6 Attorney General’s arguments erroneously conflate the legal control issue with “operational
7 control” or “functional independence” of each entity, and thus is insufficient to rebut a finding of
8 legal control of the documents for purposes of discovery.

9 Further, there is no statutory, legal, or administrative rule cited which prohibits the
10 Minnesota Attorney General from accessing the documents of the state agencies at issue for
11 purposes of discovery. The Minnesota Attorney General’s argument that “each agency has control
12 over its own data” and that therefore the Minnesota Attorney General must issue a public data
13 request or a subpoena to obtain data from state agencies who are their client is not a credible
14 interpretation of Minnesota law. Dkt. 738-19 at 2 (citing Minn. Stat. § 13.05(9)). There is no
15 citation to law holding that a public records request is the only way for the Minnesota Attorney
16 General to get documents from state agencies they are representing in litigation. [Dkt. 738-19 at 2].
17 If the Minnesota Attorney General were correct, then the Minnesota Attorney General would have
18 to submit a Public Information Act request every time they represent a state agency, to get
19 documents from its own client – which is not merely impractical and not believable but also contrary
20 to the principles of effective legal representation. As counsel, the Minnesota Attorney General will
21 have the normal type of direct access to the necessary documents from its own clients, without
22 resorting to public channels, ensuring efficient and comprehensive legal support for the agencies
23 involved. The cited Minnesota statute on Data Practices is not an impediment to that access, because
24 that statute only applies to data which are to be produced for public inspection (and not for purposes
25 of litigation such as this case in which there is a Protective Order limiting public availability of
26 confidential documents). Minn. Stat. § 13.01. Further, the Minnesota statute nowhere states that
27 this statute is the only means by which the Minnesota Attorney General can obtain records from
28 other state agencies – the statute merely sets up a permissive system for public inspection, not a

1 restriction or limitation on access. Indeed, the Minnesota Attorney General has cited no precedent
2 requiring the Minnesota Attorney General to use either a public request or a subpoena to obtain
3 documents from state agencies represented in litigation by the Minnesota Attorney General. The
4 Court finds this argument to be wholly unpersuasive.

5 Significantly, the Minnesota Attorney General ignores that this public data statute
6 specifically exempts attorneys collecting data when those attorneys are acting as counsel for a
7 government entity, and the statute specifically mandates that such attorneys' uses and collections of
8 data from agencies are governed by statutes, rules, and professional responsibility standards for
9 discovery instead. Minn. Stat. § 13.393 ("Notwithstanding the provisions of this chapter and section
10 15.17, the use, collection, storage, and dissemination of data by an attorney acting in a professional
11 capacity for a government entity shall be governed by statutes, rules, and professional standards
12 concerning discovery, production of documents, introduction of evidence, and professional
13 responsibility[.]"). The Minnesota statutory scheme thus directly provides the Minnesota Attorney
14 General an explicit legal right to obtain and access documents from the agencies at issue pursuant
15 to the normal rules and statutes for discovery, when acting as counsel for those agencies. The Court
16 thus finds that Minn. Stat. § 13.393 directly satisfies *Citric Acid*'s requirement of a showing of a
17 legal right to access the documents of the state agencies at issue.

18 The Court rejects the Minnesota Attorney General's argument that there is no law "that
19 grants the [Minnesota Attorney General] blanket authority to obtain agency documents upon
20 demand" in light of this statute and in light of the fact that the control test under *Citric Acid* does
21 not require "blanket authority." [Dkt. 738-19 at 2].

22 Next, the Minnesota Attorney General argues that "[r]equiring the [Minnesota Attorney
23 General] to produce agency documents would upend the constitutional division of powers because
24 the [Minnesota] Governor would be able to impermissibly control the [Minnesota Attorney
25 General's] litigation by, for example, instructing agencies to refuse to produce documents." [Dkt.
26 738-19 at 2]. This is the same "virtual veto" argument advanced by several other states' Attorneys
27 General and discussed above. As explained previously, the Court finds the "virtual veto" argument
28 to be speculative and unpersuasive. This argument is based on an unfounded assumption that the

Governor and state agencies would inexplicably obstruct a state's attorney general's independent law enforcement responsibilities. This argument rests entirely on an unreasonable, unfounded, hypothetical assumption that, despite this Court issuing an Order finding control, the Governor and state agencies would simply refuse to provide documents based on nothing more than an obstinate and unreasoned disagreement. The Minnesota Attorney General presented no facts, no affidavits, no prior examples of state agency refusals, and no testimony to support this feared response by the Governor or state agencies. Contrary to the unfounded assumption that state agencies will refuse to provide documents, the Court presumes, instead, that parties (including third parties such as the agencies at issue here) will act reasonably in the face of a court Order and will comply with the Federal Rules of Civil Procedure. The argument also directly contradicts the well-established legal principle and statutory scheme that a state attorney general, acting as counsel, inherently has access to relevant documents to effectively represent a state agency.

XIX. MISSOURI

In opposition to the control issue, the Missouri Attorney General argues primarily the following factors: (1) the Missouri Attorney General is a separate entity and independent from the Missouri agencies; (2) the Missouri Attorney General brought the lawsuit under its own independent law enforcement capacity; (3) the Missouri Attorney General does not seeking relief on behalf of the Missouri agencies; (4) Missouri agencies are statutorily responsible for maintaining, preserving, retaining, and providing access to its own records; and (5) under Missouri case law, Missouri agencies are not required to produce records of another agencies and it is prohibited from disseminating records of any agency other than its own records. [Dkt. 738-20 at 2].

In support of a finding of control with regard to these state agencies' documents, Meta argues primarily that the Missouri Attorney General is tasked with appearing in and defending any proceeding or tribunal in which the state's interests are involved. *Id.* at 3. Here, Meta seeks discovery from the following agencies: Department of Economic Development, Department of Elementary and Secondary Education, Department of Health and Senior Services, Department of Higher Education & Workforce Development, Department of Mental Health, Department of Social Services, Office of Administration, Office of the Child Advocate, and Governor's Office. *Id.*

1 After considering the factors argued in the briefs, the Court finds that the factors weigh in
2 favor of a finding that the Missouri Attorney General has legal control, for purposes of discovery,
3 over the documents of the listed Missouri agencies. While the Missouri Attorney General is a
4 separate entity and while the Missouri Attorney General does bring the instant action exercising its
5 own independent authority, this does not outweigh the fact that the Missouri Attorney General will
6 act as the agencies' counsel. First, the Missouri Attorney General "may also appear and interplead,
7 answer or defend, in any proceeding or tribunal in which the state's interests are involved." Mo.
8 Stat. § 27.060. It is self-evident that, when a Missouri agency is the subject or target of discovery,
9 the state's interests are involved.

10 Importantly, the Missouri Attorney General's arguments do not negate the fact that (unlike
11 other states) there is no cited law or statute which empowers any of the Missouri agencies at issue
12 here to employ or obtain counsel in this matter other than the Attorney General. [Dkt. 738-13 at 2].
13 Indeed, under Missouri precedent, "[t]he Attorney General is authorized to represent the interests of
14 the State generally." *Fogle v. State*, 295 S.W.3d 504, 510 (Mo. Ct. App. 2009). Indeed, the Missouri
15 Attorney General confirmed that its office could represent all of the Missouri agencies at issue if
16 Meta were to serve those agencies with a subpoena in this matter. [Dkt. 738-1 at 18]. Accordingly,
17 it appears that under the statutory scheme each agency will likely be represented by the Missouri
18 Attorney General in this matter for discovery. *See* Mo. Stat. § 27.060. Thus, because the Missouri
19 Attorney General will likely be involved in representing these state agencies in any event in this
20 case, whether to respond to subpoenas or to respond to party discovery.

21 Relatedly, the Missouri Attorney General has taken the position that, "to the extent a separate
22 division" of the Attorney General's office "may be engaged by an agency," communications
23 between the Missouri Attorney General and these state agencies are subject to the attorney-client
24 privilege. [Dkt. 738-20 at 2]. To the extent the Missouri Attorney General has attempted to
25 subdivide its own office between the attorneys currently prosecuting this case and other attorneys
26 within the state Attorney General in order to somehow argue that the scope of attorney-client
27 privilege is limited only as to some parts of the state Attorney General's office but not "section
28 counsel," that argument is not supported by citation to law and is contrary to the weight of law. *Id.*

1 The scope of attorney-client relationship (and the duties flowing therefrom, including the scope of
2 the attendant attorney-client privilege) encompasses the entirety of a legal services organization due
3 to well-known rules of imputation of confidences to a legal services organization, including a public
4 law office. *See, e.g., People ex rel. Peters*, 951 P.2d at 930 (“When an attorney associates with a
5 law firm, the principle of loyalty to the client extends beyond the individual attorney and applies
6 with equal force to the other attorneys practicing in the firm. This principle, known as the ‘rule of
7 imputed disqualification,’ . . . requires disqualification of all members of a law firm when any one
8 of them practicing alone would be disqualified because of a conflict of interest The rule of
9 imputed disqualification applies to both private firms and public law firms such as a district
10 attorney’s office or the office of the state public defender.”); *accord City of Cnty. of Denver*, 37 P.3d
11 at 457; *see also Kirk*, 108 Cal. Rptr. 3d at 637–38, 642 (“We do not doubt that vicarious
12 disqualification is the general rule, and that we should presume knowledge is imputed to all
13 members of a tainted attorney’s law firm. However, we conclude that, in proper circumstances, the
14 presumption is a rebuttable one[.]” The court recognizing presumption of imputed knowledge in
15 the context of government attorneys, which presumption could be rebutted by proper ethical
16 screening); *cf. also Billings*, 441 S.E.2d at 266 (because individual government lawyer at issue
17 “should be screened from any direct or indirect participation in the matter,” vicarious
18 disqualification of entire office denied); *cf. also Calhoun*, 492 S.W.3d at 137 (individual lawyer
19 disqualified when joining prosecutors’ office but “the entire office in which that attorney works is
20 not disqualified as long as the disqualified attorney is appropriately screened. Disqualification of
21 the entire prosecuting office is not necessary absent special facts, such as a showing of actual
22 prejudice; or, perhaps the screening procedures are ineffective.”). Some jurisdictions treat public
23 legal service organizations like private law firms and impute shared confidences among lawyers of
24 the entire public law entity. Even in jurisdictions which do not automatically impute
25 disqualification, and shared confidences, to an entire public law office, those courts recognize that
26 ethical screening or other procedures are required out of recognition that actual (as opposed to
27 imputed) sharing of confidences may occur and such procedures are required to avoid dissemination
28 of attorney-client privileged communications within an entire public law organization. This review

1 of case law demonstrates that no courts support the Missouri Attorney General’s argument that
2 different individual lawyers in the Missouri Attorney General’s office have *ex ante* separable,
3 discrete attorney-client relationships.

4 The Court rejects the Missouri Attorney General’s attempt to simultaneously disclaim the
5 existence of an attorney-client privilege as between the attorneys currently working on this case,
6 while apparently attempting to preserve the ability to assert that the privilege applies to
7 communications between other lawyers in the Missouri Attorney General’s Office and these
8 agencies. “[T]o the extent that [the State] asserts an attorney-client privilege with these
9 legislators, it does so solely in their official capacities [I]t is inconsistent for the State to argue
10 that on one hand the [State] Attorney General represents these individuals, but that for discovery
11 purposes the [Plaintiff] United States must resort to Federal Rule of Civil Procedure 45.” *Perez*,
12 2014 WL 1796661, at *2. To the extent the Missouri Attorney General is asserting that the attorney-
13 client privilege would apply to communications between the Missouri Attorney General’s office
14 and the agencies at issue, that further supports the conclusion of control here. Assertion of the
15 attorney-client privilege requires, as a prerequisite, the existence of an attorney-client relationship.
16 *See Graf*, 610 F.3d at 1156. Just as the Court in *Perez* rejected the inconsistent approach to privilege
17 there, here the Missouri Attorney General argues that Meta’s discovery is “so broad” as to
18 encompass communications between “sections of the [Missouri Attorney General] not participating
19 in this action” (at least, as of the date of this brief) and the agencies, and “there is the possibility that
20 those agencies, in conjunction with their Agency section counsel” could assert privilege. [Dkt. 738-
21 20 at 2]. The Missouri Attorney General’s attempt to preserve the ability to assert the attorney-
22 client privilege between the Missouri Attorney General’s office and the agencies at issue further
23 supports the conclusion of control here. Here, it is not convincing to argue that sub-teams attorneys
24 within the Missouri Attorney General’s office have their own separate attorney-client relationships
25 with the state agencies. The Missouri Attorney General has already confirmed that their office could
26 represent these agencies for discovery in this matter. [Dkt. 738-20 at 18]. Assertion of the attorney-
27 client privilege requires, as a prerequisite, the existence of an attorney-client relationship. *See Graf*,
28 610 F.3d at 1156.

Further, there is no citation to any statutory or legal prohibition on the Missouri Attorney General's representing the state agencies in this matter for purposes of discovery. The Court recognizes that this is a somewhat unusual situation, in which a law enforcement organization, the attorney general, is both a party to the case while also acting or able to act as counsel for a third party. However, this would not be the first time that a legal services provider, as a party, is found to have control over third party documents for purposes of discovery. *See, e.g., Becnel*, 2018 WL 691649, at *4 ("Both Salas individually and his law firm, the subpoena recipients and defendants in this court, are counsel of record for the Salas defendants in the Florida lawsuit Thus, a Rule 34 request for production to Salas in the Florida lawsuit required Salas to respond as to responsive materials over which Salas and his law firm had possession, custody or control."). Indeed, one court has noted that "[i]n general, an attorney is presumed to have control over documents in its client's possession." *Perez*, 2014 WL 1796661, at *2. The Court is not holding broadly that there must be a finding of a legal right of access to and thus control over third party client documents in every case involving a legal services provider as a party; rather, under the particular facts here, and under the totality of circumstances viewed in light of applicable legal standards, the Court finds that control exists here.

The Missouri Attorney General's likely role as counsel for the agencies at issue would inherently involve obtaining necessary documents for effective representation in litigation. In acting as counsel, the Missouri Attorney General would necessarily have access to and thus control over the relevant documents needed to respond to discovery requests. *See Monsanto*, 2023 WL 4083934, at *5–6 (finding state Attorney General has control over agency documents "based on his broad statutory and common law powers to control and manage legal affairs on behalf of state agencies, has a legal right to obtain responsive documents from the state agencies referenced in the Complaint"). To the extent the Missouri Attorney General argues that the "[Missouri Attorney General] is an elected official independent of the [Missouri] Governor," *see* dkt. 738-20 at 2, that argument misapprehends the "legal control" test for documents – the issue is not simply whether one entity is under the day-to-day operational control of the other (such as a parent-wholly-owned-subsidiary relationship), and not simply whether the two entities are legally separate (such as two

different and separately incorporated entities), but rather whether there is a legal right to obtain the documents as explained by *Citric Acid*. ““The control analysis for Rule 34 purposes does not require the party to have actual managerial power over the foreign corporation, but rather that there be close coordination between them.”” *St. Jude Medical S.C., Inc.*, 305 F.R.D. at 638. Here, the attorney-client relationship between the state Attorney General and the state agencies (a relationship mandated by state law) necessitates close coordination. While operational control may be a factual situation which demonstrates a legal right to obtain the documents, the absence of such “executive or functional control” is not determinative for evaluating “control” for purposes of discovery. By definition, the “legal control” issue for discovery arises when there are two legally distinct or separate entities – otherwise, if only one entity were involved, there would be no dispute that party discovery covered that one entity. As discussed above, courts have found “control” for purposes of discovery where a party is clearly not in managerial control over the third-party, such as a subsidiary having control over the documents of a parent corporation, or an individual government officer having control over the documents of an entire agency. Thus, arguing that “[t]he Governor, not the [Missouri Attorney General], has executive control over other state agencies,” dkt. 738-20 at 2, is simply re-stating the issue to be decided, and not determinative of the issue. The Missouri Attorney General’s arguments erroneously conflate the legal control issue with “operational control” or “functional independence” of each entity, and thus is insufficient to rebut a finding of legal control of the documents for purposes of discovery.

Further, there is no statutory, legal, or administrative rule cited which prohibits the Missouri Attorney General from accessing the documents of the state agencies at issue for purposes of discovery. The Missouri Attorney General’s argument that “an agency is not in possession of another’s records, and cannot produce that which it does not possess, it is error to compel one agency to produce another’s records” is fundamentally a legally erroneous proposition, because the argument focuses solely on “possession” and presumes incorrectly that Federal Rule of Civil Procedure 34 lacks the word control as a disjunctive basis for requiring party discovery. [Dkt. 738-20 at 2]. The Missouri Attorney General’s citation to and reliance on *Bedell* is inapposite. *Id.* (citing *Bedell v. Dir. of Revenue, State of Mo.*, 935 S.W.2d 94, 96 (Mo. Ct. App. 1996)). In *Bedell*, the

1 state court did not apply any version of the control test applicable under federal law such as *Citric*
2 *Acid* – instead, the *Bedell* court focused exclusively on state law precedent limited to whether one
3 agency “possessed” the documents of another agency. *Bedell*, 935 S.W.2d at 96. *Bedell* is legally
4 irrelevant to the issue in dispute here, as well as presenting a factually distinguishable scenario.

5 Indeed, at least one other federal court has previously found that the Missouri Attorney
6 General has legal control over Missouri state agency materials. *Generic Pharmaceuticals (II)*, 699
7 F. Supp. 3d at 357–58. While this Court reaches its own independent conclusions consistent with
8 the applicable legal standards discussed above and in light of the facts and circumstances presented
9 here, the analysis in the *Generic Pharmaceuticals (II)* Multi-District Litigation is certainly
10 consistent with, and to that extent further persuasively supports, the conclusion here with regard to
11 the Missouri Attorney General’s having control with regard to documents of the state agencies at
12 issue. Given that the *Generic Pharmaceuticals (II)* opinion resolved the control issue against all the
13 objecting states including Missouri, this Court is disappointed that the Missouri Attorney General
14 and Meta were unable to reach a negotiated resolution of this dispute, which other states were able
15 to do in *Generic Pharmaceuticals (II)*. As the Court has repeatedly encouraged the Parties at
16 multiple Discovery Management Conferences, they should make every effort to work out discovery
17 disputes through reasonable, good faith negotiations between able and experienced counsel,
18 particularly where, as here, there is guidance in precedent on the discovery issue at hand.

19 **XX. MONTANA**

20 In opposition to the control issue, the Montana Attorney General argues primarily the
21 following factors: (1) the Montana Attorney General is a separate entity and independent from the
22 Montana agencies; and (2) the Montana Governor could choose to employ counsel different from
23 the Montana Attorney General. [Dkt. 738-21 at 2].

24 In support of a finding of control with regard to these state agencies’ documents, Meta argues
25 primarily that the Montana Attorney General is tasked with appearing in and defending any
26 proceeding or tribunal in which the state’s interests are involved. *Id.* at 3. Here, Meta seeks
27 discovery from the following agencies: Board of Public Education, Department of Commerce,
28 Department of Public Health and Human Services, Governor’s Office, Office of the Commissioner

1 of Higher Education, and Office of Public Instruction. *Id.*

2 After considering the factors argued in the briefs, the Court finds that the factors weigh in
3 favor of a finding that the Montana Attorney General has legal control, for purposes of discovery,
4 over the documents of the listed Montana agencies. While the Montana Attorney General is a
5 separate entity and while the Montana Attorney General does bring the instant action exercising its
6 own independent authority, this does not outweigh the fact that the Montana Attorney General has
7 broad authority to act as the agencies' counsel.

8 First, under the Montana Constitution the Montana Attorney General is the "legal officer of
9 the state and shall have the duties and powers provided by law." Mont. Const. § 4(4). The Montana
10 Supreme Court has held that Montana Court precedent supports the notion that the Montana
11 Attorney has "**broad powers . . . as the first legal officer of the state.**" *Montana Power Co. v.*
12 *Montana Dep't of Pub. Serv. Regul.*, 709 P.2d 995, 1002 (Mont. 1985) (citing *State ex rel. Olsen v.*
13 *Public Service Commission*, 283 P.2d 594 (Mont. 1955) [hereinafter *Olsen*]) (emphasis added). The
14 Montana Supreme Court furthered that "the [Montana] Attorney General not only had the
15 constitutional and statutory powers specifically enumerated for him, but **broad common law duties**,
16 when not restricted or limited by statute." *Id.* In *Olsen*, the Montana Supreme Court explained in
17 fulsome detail the breadth of the powers of the state Attorney General:

18 [T]his court has repeatedly held that the attorney general has
19 common-law powers and duties. The Attorney General is the
20 principal law officer of the state. His duties are general. His authority
21 is co-extensive with public legal affairs of the whole community . . .
22 . The office of Attorney General is of ancient origin. The powers and
23 duties appertaining to it were recognized by the common law, and the
24 common law has been a part of our system of jurisprudence from the
25 organization of Montana territory to the present day It is the
26 general consensus of opinion that in practically every state of this
27 Union whose basis of jurisprudence is the common law, the office of
28 Attorney General, as it existed in England, was adopted as a part of
the governmental machinery, and that in the absence of express
restrictions, the common-law duties attach themselves to the office so
far as they are applicable and in harmony with our system of
government

The authorities substantially agree that, in addition to those conferred
on it by statute, the office is clothed with all of the powers and duties
pertaining thereto at common law; and, as the chief law officer of the
State, the Attorney General, in the absence of express legislative
restriction to the contrary, may exercise all such power and authority

as the public interests may from time to time require. In short, the Attorney General's powers are as broad as the common law unless restricted or modified by statute

Moreover, it is generally held that the attorney general, in addition to the powers and duties conferred and imposed upon him by statute, is clothed and charged with all the common-law powers and duties pertaining to his office as well, except in so far as they have been expressly restricted. The duties of the office are so numerous and varied that it has not been the policy of the state legislatures to attempt specifically to enumerate them; and it cannot be presumed, therefore, in the absence of an express inhibition, that the attorney general has not such authority as pertained to his office at common law. Accordingly, as the chief law officer of the state, he may, in the absence of some express legislative restriction to the contrary, exercise all such power and authority as public interests may, from time to time, require, and may institute, conduct, and maintain all such suits and proceedings as he deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights

The common-law duties of the attorney general, as chief law officer of the state, when not restricted or limited by statute, are very numerous and varied. In England, the Attorney General was the chief legal adviser of the Crown and was intrusted [sic] with the management of all legal affairs and the prosecution of all suits, civil and criminal, in which the Crown was interested. . . . Such being the nature of the rights and duties that attached to the position at its inception, it is generally held that in the exercise of his common-law powers, an attorney general may not only control and manage all litigation in behalf of the state, but he may also intervene in all suits or proceedings which are of concern to the general public

Obviously there can be no dispute as to the right of an attorney general to represent the state in all litigation of a public character. The attorney general represents the public and may bring all proper suits to protect its rights.

Olsen, 283 P.2d at 598–99 (internal quotations and citations omitted; emphasis added).

It is self-evident that, when a Montana agency is the subject or target of discovery, in a case such as this, such a proceeding is litigation of a public character, involves the public interests, and involves the public legal affairs of the state. *See id.* Indeed, in the complaint here discusses, in several sections, alleged harms to Montana consumers and young Montanans which implicate issues of public character and the public interest. *See, e.g., Montana v. Meta Platforms, Inc.*, No. 24-cv-00805, at Dkt. 1. Further, the multistate complaint expressly states that this action is in the public interest of the Filing States. *See* Multistate Complaint at ¶ 12.

Importantly, the Montana Attorney General's arguments do not negate the fact that (unlike

1 other states) there is no cited law or statute which empowers any of the Montana agencies at issue
2 here to employ or obtain counsel in this matter other than the Montana Attorney General. [Dkt.
3 738-21 at 2]. Indeed, the Montana Attorney General confirmed that its office could represent all of
4 the Montana agencies at issue if Meta were to serve those agencies with a subpoena in this matter.
5 [Dkt. 738-1 at 19]. Accordingly, it appears that, under the broad common law and constitutional
6 duties of the Montana Attorney General, each agency will likely be represented by the Montana
7 Attorney General in this matter for discovery. *See* Mont. Const. § 4(4). Thus, because the Montana
8 Attorney General will likely be involved in representing these state agencies in any event in this
9 case, whether to respond to subpoenas or to respond to party discovery.

10 Relatedly, the Montana Attorney General argues that, “[b]ecause the Montana Attorney
11 General’s Office does not represent any of the six state entities at issue, its position is that pre-suit
12 communications related to this matter between the [Montana Attorney General’s] Office and those
13 entities are not protected by the attorney-client privilege.” [Dkt. 738-21 at 2]. That statement,
14 however, is silent as to (and thus appears artfully drafted to leave open the possibility) whether the
15 Montana Attorney General will assert privilege with respect to post-suit communications. The
16 Court rejects the Montana Attorney General’s attempt to simultaneously disclaim the existence of
17 an attorney-client privilege for pre-suit communications, while apparently attempting to preserve
18 the ability to assert the privilege applies to post-suit communications. “[T]o the extent that [the
19 State] asserts an attorney-client privilege with these legislators, it does so solely in their official
20 capacities [I]t is inconsistent for the State to argue that on one hand the [State] Attorney
21 General represents these individuals, but that for discovery purposes the [Plaintiff] United States
22 must resort to Federal Rule of Civil Procedure 45.” *Perez*, 2014 WL 1796661, at *2. To the extent
23 the Montana Attorney General implies its intention to assert that the attorney-client privilege would
24 apply to communications between the Montana Attorney General’s office and the agencies at issue,
25 that would further supports the conclusion of control here. Assertion of the attorney-client privilege
26 requires, as a prerequisite, the existence of an attorney-client relationship. *See Graf*, 610 F.3d at
27 1156.

28 Further, the Montana Attorney General does not cite any statutory or legal prohibition on

1 the Montana Attorney General’s representing the state agencies in this matter for purposes of
2 discovery. Indeed, the Montana Attorney General admits that “the Attorney General’s Office has
3 statutory and common-law responsibility and authority to represent these agencies in certain
4 circumstances.” [Dkt. 738-21 at 2]. Under *Olsen*, the broad common law power to represent the
5 state’s agencies would only be limited by statute – and none is argued here. *Olsen*, 283 P.2d at 599.
6 The Court recognizes that this is a somewhat unusual situation, in which a law enforcement
7 organization, the attorney general, is both a party to the case while also acting or able to act as
8 counsel for a third party. However, this would not be the first time that a legal services provider, as
9 a party, is found to have control over third party documents for purposes of discovery. *See, e.g.,*
10 *Becnel*, 2018 WL 691649, at *4 (“Both Salas individually and his law firm, the subpoena recipients
11 and defendants in this court, are counsel of record for the Salas defendants in the Florida lawsuit . .
12 . . . Thus, a Rule 34 request for production to Salas in the Florida lawsuit required Salas to respond
13 as to responsive materials over which Salas and his law firm had possession, custody or control.”).
14 Indeed, one court has noted that “[i]n general, an attorney is presumed to have control over
15 documents in its client’s possession.” *Perez*, 2014 WL 1796661, at *2. The Court is not holding
16 broadly that there must be a finding of a legal right of access to and thus control over third party
17 client documents in every case involving a legal services provider as a party; rather, under the
18 particular facts here, and under the totality of circumstances viewed in light of applicable legal
19 standards, the Court finds that control exists here.

20 The Montana Attorney General’s likely role as counsel for the agencies at issue would
21 inherently involve obtaining necessary documents for effective representation in litigation. In acting
22 as counsel, the Montana Attorney General would necessarily have access to and thus control over
23 the relevant documents needed to respond to discovery requests. *See Monsanto*, 2023 WL 4083934,
24 at *5–6 (finding state Attorney General has control over agency documents “based on his broad
25 statutory and common law powers to control and manage legal affairs on behalf of state agencies,
26 has a legal right to obtain responsive documents from the state agencies referenced in the
27 Complaint”). To the extent the Montana Attorney General argues that state Constitution establishes
28 “constitutionally independent executive offices, which are each separately elected and operate with

1 their own independent constitutional authority—including the Attorney General,” *see* dkt. 738-21
2 at 2, that argument misapprehends the “legal control” test for documents – the issue is not simply
3 whether one entity is under the day-to-day operational control of the other (such as a parent-wholly-
4 owned-subsidary relationship), and not simply whether the two entities are legally separate (such
5 as two different and separately incorporated entities), but rather whether there is a legal right to
6 obtain the documents as explained by *Citric Acid*. ““The control analysis for Rule 34 purposes does
7 not require the party to have actual managerial power over the foreign corporation, but rather that
8 there be close coordination between them.”” *St. Jude Medical S.C., Inc.*, 305 F.R.D. at 638. Here,
9 the attorney-client relationship between the state Attorney General and the state agencies (a
10 relationship mandated by state law) necessitates close coordination. While operational control may
11 be a factual situation which demonstrates a legal right to obtain the documents, the absence of such
12 “executive or functional control” is not determinative for evaluating “control” for purposes of
13 discovery. By definition, the “legal control” issue for discovery arises when there are two legally
14 distinct or separate entities – otherwise, if only one entity were involved, there would be no dispute
15 that party discovery covered that one entity. As discussed above, courts have found “control” for
16 purposes of discovery where a party is clearly not in managerial control over the third-party, such
17 as a subsidiary having control over the documents of a parent corporation, or an individual
18 government officer having control over the documents of an entire agency. Thus, arguing that
19 “Montana law provides that state records ‘are and remain the property of the public agency
20 possessing the records,’” dkt. 738-21 at 2 (citing Mont. Code § 2-6-1013(1)), focuses on the
21 irrelevant issue of “possession” and ignores the control issue to be decided. The Montana Attorney
22 General’s arguments also erroneously conflate the legal control issue with “operational control” or
23 “functional independence” of each entity, and thus is insufficient to rebut a finding of legal control
24 of the documents for purposes of discovery.

25 Further, there is no statutory, legal, or administrative rule cited which prohibits the Montana
26 Attorney General from accessing the documents of the state agencies at issue for purposes of
27 discovery. The Montana Attorney General’s argument that “even where the Attorney General *does*
28 represent a state agency, the Office functions like an ordinary attorney serving its client, and thus

1 must obey the agency's litigation decisions" is essentially the same argument rejected above that
2 counsel is helpless in the face of an intransigent client and somehow has no duties to the Court to
3 work on discovery, including supervising the collection of documents. Dkt. 738-20 at 2 (emphasis
4 in original). Lawyers are not entirely helpless or absolved of all duty to supervise and, if necessary,
5 directly obtain documents from clients for discovery. Contrary to the Montana Attorney General's
6 argument "[i]n general, an attorney is presumed to have control over documents in its client's
7 possession." *Perez*, 2014 WL 1796661, at *2. The Federal Rules of Civil Procedure contemplate
8 and require that counsel take proactive steps, without the need for constant court intervention, to
9 comply with and collaborate on discovery, including taking appropriate steps to collect (or supervise
10 the collection) of documents from clients. The system for rational and reasonable discovery and
11 disclosures under the Federal Rules would fall apart if lawyers were simply relieved of any legal
12 duty or obligations to obtain documents for production in discovery from their clients. As discussed
13 above, that legal duty is jurally related to and logically another facet of a legal right to obtain
14 documents. Here, the Montana Attorney General cites no law which permits them to avoid those
15 obligations and their attendant legal rights.

16 For those reasons, the Court finds that the factors weigh in favor of a finding that the
17 Montana Attorney General has legal control, for purposes of discovery, over the documents of the
18 listed Montana agencies.

19 **XXI. NEBRASKA**

20 In opposition to the control issue, the Nebraska Attorney General argues primarily the
21 following factors: (1) the Nebraska Attorney General is a separate entity and independent from the
22 Nebraska agencies; (2) the Nebraska Attorney General brought the lawsuit under its own
23 independent law enforcement capacity; (3) the Nebraska Attorney General does not seek relief on
24 behalf of the Nebraska agencies; and (4) Nebraska avers that "State agencies routinely refuse to
25 provide information to [the Nebraska Department of Justice] Consumer Protection Bureau absent a
26 third-party civil investigative demand, third-party subpoena, or a public records request[.]" [Dkt.
27 738-22 at 2].

28 In support of a finding of control with regard to these state agencies' documents, Meta argues

1 based primarily on the following factors: (1) under Nebraska law, the Nebraska Attorney General
2 has general control and supervision of all legal business of all Nebraska departments and bureaus,
3 and (2) Nebraska agencies are proscriptively barred from obtaining counsel other than the Nebraska
4 Attorney General without consent from the Nebraska Attorney General or Nebraska Governor. *Id.*
5 at 3. Here, Meta seeks discovery from the following agencies: the Children’s Commission,
6 Department of Administrative Services, Department of Economic Development, Department of
7 Education, Department of Health and Human Services, and Governor. *Id.*

8 After considering the factors argued in the briefs, the Court finds that the factors weigh in
9 favor of a finding that the Nebraska Attorney General does have legal control, for purposes of
10 discovery, over the listed Nebraska agencies. While the Nebraska Attorney General is a separate
11 entity and while the Nebraska Attorney General does bring the instant action in its own independent
12 authority, this does not outweigh the legal right to access agencies’ documents which result from
13 the requirement that the Nebraska Attorney General must statutorily act as the Nebraska agencies’
14 counsel.

15 Under Nebraska’s statutory scheme, the Nebraska Attorney General has “the general control
16 and supervision of all actions and legal proceedings in which the State of Nebraska may be a party
17 or may be interested, and ***shall have charge and control of all the legal business of all departments***
18 ***and bureaus of the state, or of any office thereof, which requires the services of attorney or counsel***
19 ***in order to protect the interests of the state.***” Neb. Rev. Stat. § 84-202 (emphasis added).
20 Additionally, “[t]he [Nebraska] Attorney General is authorized to appear for the state and prosecute
21 and defend, in any court or before any officer, board or tribunal, any cause or matter, civil or
22 criminal, in which the state may be a party or interested.” Neb. Rev. Stat. § 84-203.

23 Further, there is no citation to any statutory or legal prohibition on the Nebraska Attorney
24 General’s representing the state agencies in this matter for purposes of discovery. Indeed, under
25 Nebraska law, the Nebraska Attorney General shall “prosecute or defend for the state ***all civil*** or
26 criminal actions and proceedings relating to any matter connected with any of such officers’
27 departments if, after investigation, he or she is convinced there is sufficient legal merit to justify the
28 proceeding” upon “the request of the Governor, head of any executive department, Secretary of

1 State, State Treasurer, Auditor of Public Accounts, Board of Educational Lands and Funds, State
2 Department of Education, or Public Service Commission.” Neb. Rev. Stat. § 84-205(5) (emphasis
3 added). In any such actions, the state agencies “*shall not pay or contract to pay* from the funds of
4 the state *any money for special attorneys* or counselors-at-law unless the employment of such
5 special counsel is made upon the written authorization of the Governor or the Attorney General.”
6 *Id.* (emphasis added). The Nebraska statutory scheme makes clear the Nebraska legislature’s strong
7 preference that the Nebraska Attorney General represent state agencies in civil matters.

8 Indeed, the Nebraska Attorney General confirmed that its office could represent all but one
9 of the agencies at issue if Meta were to serve those agencies with a subpoena in this matter. [Dkt.
10 738-1 at 19–20]. With respect to the one exception (the Nebraska Governor), the briefs and
11 submissions from the Nebraska Attorney General do not explain how (in light of the Nebraska
12 statutory scheme) the Nebraska Governor would not be represented by the Attorney General. The
13 Nebraska cites no statutory or legal provision which bars the Nebraska Attorney General from
14 representing the Nebraska Governor. The Nebraska Attorney General concedes that “[w]hen a
15 Nebraska state agency receives a subpoena, it *may choose* to seek assistance from the [Nebraska
16 Department of Justice] Legal Services and Civil Litigation Bureaus, who can serve as outside
17 counsel for certain agencies.” Dkt. 738-22 at 2 (emphasis added). As discussed, no separate counsel
18 has appeared for any Nebraska state agencies, despite the fact that litigation holds have been issued
19 and the agencies have had notice of the pendency of discovery in this matter for some time.
20 Accordingly, based on the statutory scheme and the record before the Court, the Nebraska Attorney
21 General will likely represent these state agencies for purposes of discovery.

22 As part of the argument stressing the separation of the Attorney General’s office from the
23 state agencies, the Nebraska Attorney General relies on a “governmental structure” argument to
24 subdivide the office of the Nebraska Attorney General for purposes of this dispute. Dkt. 738-22 at
25 2. The Nebraska Attorney General argues that “there is a critical distinction between the [Nebraska
26 Department of Justice] when it acts affirmatively in its capacity as enforcer of state consumer
27 protection law (as it does in this lawsuit) and the [Nebraska Department of Justice] when it acts
28 defensively in its role as outside counsel for state agencies.” *Id.* (uncited). The Nebraska Attorney

1 General argues that the “organizational structure” of the Nebraska Department of Justice
2 “distinguishes between the [Nebraska Department of Justice’s] Consumer Protection Bureau, which
3 represents the state and state consumers as enforcers of Nebraska’s consumer protection laws, and
4 the [Nebraska Department of Justice’s] Legal Services and Civil Litigation Bureaus, which advise
5 certain state agencies and occasionally represent them in court.” *Id.* The Nebraska Attorney General
6 asserts that these distinctions are germane to this “control” dispute without explaining how or why.
7 Further, the Nebraska Attorney General cites no law which finds these administrative, operational
8 groupings of lawyers within that office as relevant, much less critical, to the determination of
9 “control” under Rule 34.

10 Consistent with the “structural” argument, the Nebraska Attorney General argues that
11 communications between different sections of the Nebraska Attorney General are ethically walled
12 off where there are conflicts of interest and, on that basis, argues for a finding of no control. [Dkt.
13 738-22 at 2]. The Nebraska Attorney General cites no law, regulation, or statute which requires the
14 alleged ethical walls between different bureaus within the Attorney General’s office to be
15 established in cases such as this Multi-District Litigation, where there is no basis for a conflict of
16 interest to exist between the Attorney General’s office and any of the state agencies at issue. The
17 mere citation to the general rule of professional conduct regarding avoiding conflicts of interest is,
18 alone, not persuasive. [Dkt. 738-22 at 2 (citing Neb. R. of Prof. Cond. § 3-501.7)]. The fact that
19 ethical walls were set up in prior (unexplained and uncited) cases, where no affidavit or evidence
20 attests to any ethical wall being set up in this Multi-District Litigation. As discussed, litigation holds
21 have been issued to the state agencies and there has been ample time for ethical walls to be
22 established and for separate counsel to appear, if any were to appear. On the current record before
23 the Court, these “structural” arguments regarding sub-teams within the Nebraska Attorney General’s
24 office do not suffice to overcome the finding of “control” for purposes of discovery, much like
25 similar arguments regarding subdividing public law offices do not establish that there are separate,
26 discrete attorney-client relationships within the Nebraska Attorney General’s office and the agencies
27 at issue for purposes of this Multi-District Litigation.

28 To the extent the Nebraska Attorney General has attempted to subdivide its own office

1 between the prosecution team in this case and other divisions of the state Attorney General in order
2 to somehow argue that there is no “legal control,” that argument is not supported by citation to law
3 and is contrary to the weight of law. The scope of attorney-client relationship (and the duties flowing
4 therefrom, including the scope of the attendant attorney-client privilege) encompasses the entirety
5 of a legal services organization due to well-known rules of imputation of confidences to a legal
6 services organization, including a public law office. *See, e.g., People ex rel. Peters*, 951 P.2d at 930
7 (“The rule of imputed disqualification applies to both private firms and public law firms such as a
8 district attorney’s office or the office of the state public defender.”); *accord City of Cnty. of Denver*,
9 37 P.3d at 457; *see also Kirk*, 108 Cal. Rptr. 3d at 637–38, 642 (“We do not doubt that vicarious
10 disqualification is the general rule, and that we should presume knowledge is imputed to all
11 members of a tainted attorney’s law firm. However, we conclude that, in proper circumstances, the
12 presumption is a rebuttable one[.]” The court recognizing presumption of imputed knowledge in
13 the context of government attorneys, which presumption could be rebutted by proper ethical
14 screening); *cf. also Billings*, 441 S.E.2d at 266 (because individual government lawyer at issue
15 “should be screened from any direct or indirect participation in the matter,” vicarious
16 disqualification of entire office denied); *cf. also Calhoun*, 492 S.W.3d at 137 (individual lawyer
17 disqualified when joining prosecutors’ office but “the entire office in which that attorney works is
18 not disqualified as long as the disqualified attorney is appropriately screened. Disqualification of
19 the entire prosecuting office is not necessary absent special facts, such as a showing of actual
20 prejudice; or, perhaps the screening procedures are ineffective.”). Some jurisdictions treat public
21 legal service organizations like private law firms and impute shared confidences among lawyers of
22 the entire public law entity.

23 The Nebraska Attorney General’s role as counsel for the agencies at issue inherently
24 involves obtaining necessary documents for effective representation in litigation. In acting as
25 counsel, the Nebraska Attorney General would necessarily have access to and thus control over the
26 relevant documents needed to respond to discovery requests. *See Monsanto*, 2023 WL 4083934, at
27 *5–6 (finding state Attorney General has control over agency documents “based on his broad
28 statutory and common law powers to control and manage legal affairs on behalf of state agencies,

1 has a legal right to obtain responsive documents from the state agencies referenced in the
2 Complaint”). The fact that there might be different sub-teams or different individual attorneys
3 working on responding to the state agency discovery requests, as compared to the attorneys working
4 on prosecuting this action, does not obviate the fact that these are all attorneys within the same
5 public law office. If, as here, the Attorney General’s office is counsel for the agencies, then the
6 Attorney General’s office will have a legal right to access the state agencies’ documents, and there
7 is no law which alters that conclusion simply because different individual lawyers within the same
8 legal services organization have the direct communications and relationships with the state agencies.
9 Simply put, there is no cited law which determines whether specific individuals within an
10 organization themselves have individualized “control” under Rule 34 where they are seeking access
11 to the documents on behalf of the organization as a whole.

12 The Court recognizes that this is a somewhat unusual situation, in which a law enforcement
13 organization, the attorney general, is both a party to the case while also acting as counsel for a third
14 party. However, this would not be the first time that a legal services provider, as counsel for a party,
15 is found to have control over third party documents for purposes of discovery. *See, e.g., Becnel*,
16 2018 WL 691649, at *4 (“Both Salas individually and his law firm, the subpoena recipients and
17 defendants in this court, are counsel of record for the Salas defendants in the Florida lawsuit
18 Thus, a Rule 34 request for production to Salas in the Florida lawsuit required Salas to respond as
19 to responsive materials over which Salas and his law firm had possession, custody or control.”).
20 Indeed, one court has noted that “[i]n general, an attorney is presumed to have control over
21 documents in its client’s possession.” *Perez*, 2014 WL 1796661, at *2. The Court is not holding
22 broadly that there must be a finding of a legal right of access to and thus control over third party
23 client documents in every case involving a legal services provider as a party; rather, under the
24 particular facts here, and under the totality of circumstances viewed in light of applicable legal
25 standards, the Court finds that control exists here.

26 The Nebraska Attorney General argues (without citation to caselaw) that “State agencies
27 routinely refuse to provide information to NE DOJ Consumer Protection Bureau absent a third-party
28 civil investigative demand, third-party subpoena, or a public records request, all of which would be

1 handled by the agency according to its protocols.” [Dkt. 738-22 at 2]. As an initial matter, it is not
2 surprising that, in cases where the Nebraska Attorney General is investigating an agency itself for
3 potential violations of law, that agency would refuse to provide information absent formal process.
4 But the fact that state agencies would sometimes require formal investigative demands or subpoenas
5 in other cases says nothing about whether or not there is “control” for the documents at issue here.
6 As noted, there is no basis to assume that the Nebraska Attorney General and the state agencies have
7 any adversity or conflicts of interest with regard to this Multi-District Litigation. Indeed, the
8 contrary is true given that the Nebraska Attorney General has declared that this action is in the public
9 interest of the State of Nebraska. *See* Multistate Complaint at ¶ 12.

10 Further, this argument ignores that agencies’ “routinely” requesting investigative demands
11 or subpoenas or records requests in other cases (apparently where the Attorney General is adverse
12 to the agencies) does not obviate the fact that, here where the Attorney General is counsel
13 representing the agencies, such formal processes are not needed. The Nebraska Attorney General
14 cites no law supporting the view that an investigative demand, subpoena, or public records request
15 are the only ways for the Nebraska Attorney General to obtain documents from state agencies when
16 they are clients. [Dkt. 738-25 at 2]. Indeed, the Nebraska Attorney General implicitly concedes
17 that there are other avenues for that office to obtain documents from state agencies when this
18 argument is limited by the word “routinely.” *Id.* If the Nebraska Attorney General intends to imply
19 that formal mechanisms for obtaining agency documents are the only mechanisms, then the
20 Nebraska Attorney General would have to subpoena, or serve an investigative demand, or submit a
21 public records request every time the lawyers of that office were representing a state agency, to get
22 documents from their own client – which is not merely impractical but also contrary to the principles
23 of effective legal representation. As counsel for the agencies (and not prosecuting or investigating
24 the agencies), the Nebraska Attorney General will have the normal type of direct access to the
25 necessary documents from its own clients, without resorting to public channels, ensuring efficient
26 and comprehensive legal support for the agencies involved consistent with the ethical obligations
27 and applicable rules of professional conduct. To the extent the Nebraska Attorney General implies
28 that the state agencies may have a “virtual veto” here, that argument is both unsupported by evidence

1 or facts germane to this case and is legally unpersuasive as discussed above. Indeed, as discussed
2 herein, the Nebraska Attorney General argues too much by relying on these other formal procedures:
3 if the Nebraska Attorney General is implying that its lawyers “routinely” obtain agency documents
4 using legal procedures such as subpoenas, civil investigative demands, and public records requests,
5 then that admission of a “routine” process may be viewed as constituting a legal right of access to
6 the agencies’ documents upon demand. In any event, the Court need not reach that issue to find
7 “control” on the record presented here. Ultimately, the Nebraska Attorney General’s argument
8 about what may “routinely” happen in other (apparently adversarial) cases does not negate or inform
9 what is actually happening in this case, on the record before the Court here.

10 The Nebraska Attorney General argues that, because Google sought documents from
11 Nebraska state agencies by subpoena in connection with a case in the Eastern District of Virginia,
12 that somehow suggests that state agencies should not be subject to party discovery here. [Dkt. 738-
13 22 at 2 (citing *United States v. Google LLC*, 698 F. Supp. 3d 876 (E.D. Va. 2023))]. Apparently, the
14 University of Nebraska at Omaha represented itself in responding to the subpoena in the *Google*
15 case, while the Nebraska Department of Transportation was represented by the Nebraska Attorney
16 General. The subpoenas issued in April 2023. [Dkts. 738-41 to -43]. A review of the docket from
17 the *Google* Court shows that no motions to compel were filed and certainly none were decided prior
18 to April 2023. See *United States v. Google LLC*, No. 23-cv-108, at Dkts. 1-167. The only discovery
19 matters on that docket prior to April 2023 reflect stipulated and preliminary motions practice
20 regarding the protective order, ESI protocol, and the discovery plan. *Id.* It is apparent that, in the
21 circumstances of that case, Google chose not to pursue party discovery voluntarily, and instead
22 tactically chose to seek documents from the state agencies by subpoena. There is no Order on the
23 control issue decided by the *Google* Court. This Court declines the Nebraska Attorney General’s
24 suggestion to follow that “same process” here, where (unlike *Google*) Meta has chosen to litigate
25 this issue and (again unlike in *Google*) the Nebraska Attorney General has also chosen to litigate its
26 opposition to the control issue. While the parties here could have attempted to negotiate this dispute
27 to follow the non-litigated process in *Google*, there is nothing legally instructive or persuasive in
28 the voluntary process followed by the parties in *Google* which informs the “control” issue here

(other than the fact that the parties in *Google* conserved both their and that Court's resources by opting not to litigate the issue, unlike here).

Accordingly, it appears that under the statutory scheme each will be represented by the Nebraska Attorney General in this matter for discovery. Thus, because the Nebraska Attorney General appears likely to be involved in representing these state agencies in any event in this case, whether to respond to subpoenas or to respond to party discovery.

XXII. NEW JERSEY

In opposition to the control issue, the New Jersey Attorney General argues primarily that the New Jersey Attorney General is a separate entity and independent from the New Jersey agencies. [Dkt. 738-23 at 2].

In support of a finding of control with regard to these state agencies' documents, Meta argues based primarily on the following factors: (1) New Jersey agencies are proscriptively barred from obtaining counsel other than the New Jersey Attorney General without consent from the New Jersey Governor; and (2) the New Jersey Attorney General has acknowledged that it will definitely represent all but two of the identified agencies (and that it could represent the remaining two agencies). *Id.* at 3. Here, Meta seeks discovery from the following agencies: Department of Children & Families, Department of Education, Department of Health, Department of Human Services, Department of the Treasury, Economic Development Authority, Governor's Counsel on Mental Health Stigma, Office of the Governor, and Office of the Secretary of Higher Education. *Id.*

After considering the factors argued in the briefs, the Court finds that the factors weigh in favor of a finding that the New Jersey Attorney General does have legal control, for purposes of discovery, over the identified New Jersey agencies. While the New Jersey Attorney General asserts its independence as a separate entity, this does not negate the legal and practical realities highlighted by Meta. Specifically, New Jersey agencies are barred from obtaining counsel other than the New Jersey Attorney General without the Governor's consent, which firmly establishes the Attorney General as their primary legal representative.

Under New Jersey's statutory scheme, the New Jersey Attorney General shall "[e]xamine and decide all legal matters submitted to him by the Governor or the Legislature and act for them in

1 any matter in which they may be interested, and shall exclusively attend to and control all litigation
2 and controversies to which the State is a party or in which its rights and interests are involved[.]”
3 N.J. Stat. § 52:17A-4(c). Additionally, the New Jersey Attorney General shall “[a]ct as the sole
4 legal adviser, attorney or counsel[] . . . for all officers, departments, boards, bodies, commissions
5 and instrumentalities of the State Government in all matters other than those requiring the
6 performance of administrative functions entailing the enforcement, prosecution and hearing of
7 issues as imposed by law upon them; and represent them in all proceedings or actions of any kind
8 which may be brought for or against them in any court of this State[.]” N.J. Stat. § 52:17A-4(e).

9 Importantly, the New Jersey Attorney General’s arguments do not negate the fact that (unlike
10 other states) there is no cited law or statute which empowers any of the New Jersey agencies at issue
11 here to employ or obtain counsel in this matter other than the Attorney General absent consent.
12 [Dkt. 738-23 at 2]. Under New Jersey law, “[n]o special counsel shall be employed for the State or
13 for or by any officer, department, board, body, commission or instrumentality of the State
14 Government except by authority of the Attorney-General, and then only with the approval of the
15 Governor, and provided that appropriations have been made therefor, unless the matter be of such
16 an emergency and shall be so declared by the Governor.” N.J. Stat. § 52:17A-13. Indeed, the New
17 Jersey Attorney General confirmed that its office will definitely represent all but two agencies at
18 issue (and that it could represent the remaining two agencies) if Meta were to serve those agencies
19 with a subpoena in this matter. [Dkt. 738-1 at 36–37]. Accordingly, it appears that under the
20 statutory scheme almost every agency at issue will definitely be represented by the New Jersey
21 Attorney General in this matter for discovery. With regard to the the New Jersey Economic
22 Development Authority and the New Jersey Office of the Governor, the New Jersey Attorney
23 General’s indication that it could represent them is not explained in the context of the statutory
24 scheme. Here, there has been no evidence that the New Jersey Attorney General has authorized
25 separate counsel, no indication that the Governor’s approval has been sought or granted, and no
26 evidence of any appropriations having been made for separate counsel. *See* N.J. Stat. § 52:17A-
27 4(e). As discussed, no separate counsel has appeared for any New Jersey state agencies, despite the
28 fact that litigation holds have been issued and the agencies have had notice of the pendency of

1 discovery in this matter for some time. Accordingly, based on the record before the Court, the New
2 Jersey Attorney General will likely represent these two other state agencies for purposes of
3 discovery.

4 Relatedly, the New Jersey Attorney General has taken the position that the New Jersey
5 agencies do not share confidential information and do not “engage in the same functions, or have
6 the same management teams.” [Dkt. 738-23 at 2]. That argument misapprehends the “legal control”
7 test for documents – the issue is not simply whether one entity is under the day-to-day operational
8 control of the other (such as a parent-wholly-owned-subsidiary relationship), and not simply
9 whether the two entities are legally separate (such as two different and separately incorporated
10 entities), but rather whether there is a legal right to obtain the documents as explained by *Citric*
11 *Acid*. “The control analysis for Rule 34 purposes does not require the party to have actual
12 managerial power over the foreign corporation, but rather that there be close coordination between
13 them.” *St. Jude Medical S.C., Inc.*, 305 F.R.D. at 638. Here, the attorney-client relationship
14 between the state Attorney General and the state agencies (a relationship mandated by state law)
15 necessitates close coordination. While operational control may be a factual situation which
16 demonstrates a legal right to obtain the documents, the absence of such “executive or functional
17 control” is not determinative for evaluating “control” for purposes of discovery.

18 By definition, the “legal control” issue for discovery arises when there are two legally
19 distinct or separate entities – otherwise, if only one entity were involved, there would be no dispute
20 that party discovery covered that one entity. The New Jersey Attorney General’s reliance on the
21 separation between these agencies and the Department of Law and Public Safety, and the alleged
22 lack of “administrative control and oversight” is thus unpersuasive. As discussed above, courts have
23 found “control” for purposes of discovery where a party is clearly not in administrative or
24 managerial control over the third-party, such as a subsidiary having control over the documents of
25 a parent corporation, or an individual government officer having control over the documents of an
26 entire agency. The New Jersey Attorney General’s arguments erroneously conflate the legal control
27 issue with “administrative control” or “generalized control” over each entity, and thus is insufficient
28 to rebut a finding of legal control of the documents for purposes of discovery.

Further, there is no statutory, legal, or administrative rule cited which prohibits the New Jersey Attorney General from accessing the documents of the state agencies at issue for purposes of discovery. The New Jersey Attorney General’s argument that there is a lack of “unfettered access to records of every agency” and reference in general to agencies’ records laws is unpersuasive on the issue of “control” for purposes of discovery. [Dkt. 738-23 at 2]. First, the “control” test for Rule 34 does not require unbounded, fully discretionary access to records of every agency at all times under every conceivable set of circumstances – the question rather is whether there is a legal right to access upon demand the documents at issue in this case. Whether or not Meta has failed to show “unfettered access” of every agency’s records does not answer the “control” question for the specific agencies’ documents at issue here for Rule 34.

Second, the argument based on agencies’ records laws is irrelevant for the same reasons discussed herein with regard to similar arguments based on confidentiality laws of other states. The only statute actually cited by the New Jersey Attorney General relates to confidentiality of records of child abuse reports within the New Jersey Department of Children and Families. [Dkt. 738-23 at 2 (citing N.J. Stat. Ann. § 9:6-8.10a)]. As an initial matter, that statute is irrelevant to any of the other agencies at issue and poses no barriers to the New Jersey Attorney General’s access to those other agencies’ documents. Further, that statute is limited to reports, investigations, and findings of child abuse made pursuant to three specific New Jersey statutes, and thus poses no restriction on an attorney accessing other documents of the New Jersey Department of Children and Families. Because the issues being litigated in this Multi-District Litigation do not focus on specific reports or investigations of instances of child abuse in New Jersey, the cited statute appears to be irrelevant to the scope of discovery in this case. More importantly, the cited statute does not bar access to documents by an attorney representing the Department of Children and Families. Contrary to the New Jersey Attorney General’s arguments, that statute expressly states that these child abuse records “may be disclosed” in numerous listed circumstances, including disclosure to a “federal, State, or local government entity, to the extent necessary for such entity to carry out its responsibilities under law to protect children from abuse and neglect.” N.J. Stat. Ann. § 9:6-8.10a(1)(b)(20). Here, the Multistate Complaint (of which the New Jersey Attorney General is a party) asserts in multiple

sections that Meta has harmed youth. *See, e.g.*, Multistate Complaint at ¶¶ 1-2 (Meta “has ignored the sweeping damage these Platforms have caused to the mental and physical health of our nation’s youth Meta designed and deployed harmful and psychologically manipulative product features to induce young users’ compulsive and extended Platform use[.]”). Facially, the cited New Jersey records statute would appear to grant an express legal right for the New Jersey Attorney General to access these records from the Department of Children and Families, to the extent those records were necessary to carry out its responsibilities to protect children from abuse and neglect. On this basis alone, the Court finds that the cited statute, N.J. Stat. Ann. § 9:6-8.10a, satisfies *Citric Acid*’s requirement of a legal right to access those documents of that agency by the New Jersey Attorney General. For purposes of establishing “legal control” over documents, “[d]ecisions from within this circuit have noted the importance of a legal right to access documents created by *statute*, affiliation or employment.” *In re Legato Sys., Inc. Sec. Litig.*, 204 F.R.D. at 170 (emphasis added) (finding “legal control” and ordering party to obtain and produce transcript not within current possession where federal regulation, 17 C.F.R. § 203.6, grants legal right to ask for and obtain transcript of testimony from SEC); *see also In re ATM Fee Antitrust Litig.*, 233 F.R.D. at 545 (finding “a bank holding company necessarily controls its subsidiary banks” and thus has “legal control” of documents of bank by virtue of the Bank Holding Company Act, 12 U.S.C. § 1841(a)(1)).

The Court recognizes that this is a somewhat unusual situation, in which a law enforcement organization, the Attorney General, is both a party to the case while also acting or able to act as counsel for a third party. However, this would not be the first time that a legal services provider, as a party, is found to have control over third party documents for purposes of discovery. *See, e.g., Becnel*, 2018 WL 691649, at *4 (“Both Salas individually and his law firm, the subpoena recipients and defendants in this court, are counsel of record for the Salas defendants in the Florida lawsuit . . . Thus, a Rule 34 request for production to Salas in the Florida lawsuit required Salas to respond as to responsive materials over which Salas and his law firm had possession, custody or control.”). Indeed, one court has noted that “[i]n general, an attorney is presumed to have control over documents in its client’s possession.” *Perez*, 2014 WL 1796661, at *2. Here, the New Jersey Attorney General admits that “to the extent the Attorney General has any ‘control’ over a listed state

1 agency, it is exclusively in the attorney-client context.” [Dkt. 738-18 at 2]. The Court is not holding
2 broadly that there must be a finding of a legal right of access to and thus control over third party
3 client documents in every case involving a legal services provider as a party; rather, under the
4 particular facts here, and under the totality of circumstances viewed in light of applicable legal
5 standards, the Court finds that control exists here.

6 Further, the Court notes that the State Attorneys General have filed an Administrative
7 Motion to file supplemental information that Meta has recently served an intent to issue subpoenas
8 to various state agencies. *See* Dkt. 1031-5. None of these state agencies are allowed to employ
9 legal counsel other than the New Jersey Attorney General and thus by statute each must be
10 represented by the New Jersey Attorney General in this matter for discovery. *See* N.J. Stat. §
11 52:17A-4(c). This arrangement indicates strongly that the state Attorney General, in fulfilling its
12 role as chief legal advisor, would necessarily and inherently have access to and control over the
13 necessary documents for effective legal representation of these state agencies. Therefore, the Court
14 concludes that the New Jersey Attorney General has legal control, for the purposes of discovery,
15 over the documents held by the New Jersey agencies listed by Meta, including in particular the three
16 agencies recently listed in the intent to issue subpoenas.

17 Instructive on the “control” issue is the New Jersey district court opinion in *Love v. NJ Dep’t*
18 *of Corr.*, No. 2:15-CV-4404-SDW-SCM, 2017 WL 3477864 (D.N.J. Aug. 11, 2017), *opinion*
19 *clarified sub nom. Love v. New Jersey Dep’t of Corr., No. 15CV4404 (SDW)(SCM)*, 2017 WL
20 4842379 (D.N.J. Oct. 26, 2017). In *Love*, the plaintiff sued several individual officers of a New
21 Jersey state prison and served document requests on each of them. The named defendants, all
22 employees of the New Jersey Department of Corrections and all represented by the New Jersey
23 Attorney General, objected and argued that they lacked control over the documents of the
24 Department of Corrections. The *Love* Court took notice “that the Attorney General is obligated to
25 defend State employees against civil claims; and anytime a defense is provided, such as here, ‘the
26 State shall provide indemnification for the State Employee.’ Therefore, the Court finds that State
27 has a significant stake in the outcome of this suit and that Mr. Love has met his burden to prove that
28 the Northern State Officers have ‘control’, albeit through their attorney, over the records and

1 information at-issue.” *Id.* at *6. As in *Love*, here the New Jersey Attorney General both represents
2 itself and is obligated to represent the state agencies at issue, and the State of New Jersey has a
3 significant stake in the outcome of this Multi-District Litigation given that the Multistate Complaint
4 expressly states that “[t]his action is in the public interest of the Filing States.” *See* Multistate
5 Complaint at ¶ 12.

6 Finally, the Court has recognized that the issue of control of state agency documents, when
7 a State or State Attorney General is a party, has been litigated and decided in a previous Multi-
8 District Litigation involving most of the same States and State Attorneys General as are involved in
9 this case. *Generic Pharmaceuticals (II)*, 699 F. Supp. 3d at 357–58. The *Generic Pharmaceuticals*
10 (*II*) opinion not only ruled against the objecting States, but also helpfully identified numerous States
11 which withdrew their objections to party discovery and negotiated a resolution of this issue with the
12 opposing party there. *Id.* at 356 n.5. In that case, New Jersey is identified as one of the States which
13 reached agreement on the state agency control issue without requiring that court to expend resources
14 resolving the dispute there. *Id.* Given that the *Generic Pharmaceuticals (II)* opinion resolved the
15 control issue against all the remaining objecting states and given that New Jersey was able to reach
16 a negotiated resolution of the dispute in that Multi-District Litigation, this Court is disappointed that
17 the New Jersey Attorney General and Meta were unable to reach a negotiated resolution of this
18 dispute. As the Court has repeatedly encouraged the Parties at multiple Discovery Management
19 Conferences, they should make every effort to work out discovery disputes through reasonable,
20 good faith negotiations between able and experienced counsel, particularly where, as here, there is
21 guidance in precedent on the discovery issue at hand.

22 **XXIII. NEW YORK**

23 In opposition to the control issue, the New York Attorney General argues primarily the
24 following factors: (1) the New York Attorney General is a separate entity and independent from the
25 New York agencies; and (2) the New York Attorney General brought the lawsuit under its own
26 independent law enforcement capacity. [Dkt. 738-24 at 2].

27 In support of a finding of control with regard to these state agencies’ documents, Meta argues
28 based primarily on the following factors: (1) with exceptions not particularly relevant here, the New

1 York Attorney General must act as counsel for the New York agencies, and (2) nothing in New
2 York law prohibits the New York Attorney General from accessing agency documents. *Id.* at 3.
3 Here, Meta seeks discovery from the following agencies: Council on Children and Families,
4 Department of Education, Department of Health, Department of State, Higher Education Services
5 Corporation, Office of Children and Family Services, Office of Mental Health, Office of the
6 Governor, and State Division of the Budget. *Id.* Meta states that it has agreed not to seek party
7 discovery from the Empire State Development Corporation, and therefore, the Court **DENIES**
8 Meta’s motion with regard to that agency. *Id.* at 3 n.2.

9 After considering the factors argued in the briefs, the Court finds that the factors weigh in
10 favor of a finding that the New York Attorney General does have legal control, for purposes of
11 discovery, over the listed New York agencies (excluding the Empire State Development
12 Corporation, as discussed above). While the New York Attorney General is a separate entity and
13 while the New York Attorney General does bring the instant action in its own independent authority,
14 this does not outweigh the requirement that the New York General will act as the remaining
15 agencies’ counsel.

16 The statutory scheme in New York requires that the New York Attorney General
17 “[p]rosecute and defend all actions and proceedings in which the state is interested, and have charge
18 and control of all the legal business of the departments and bureaus of the state, or of any office
19 thereof which requires the services of attorney or counsel, in order to protect the interest of the
20 state[.]” N.Y. Exec. Law § 63(1).

21 The New York Attorney General does not cite to any statutory or legal prohibition on the
22 New York Attorney General’s representing the state agencies in this matter for purposes of
23 discovery. Indeed, the New York Attorney General confirmed that its office could represent the
24 agencies at issue if Meta were to serve those agencies with a subpoena in this matter. [Dkt. 738-1
25 at 21]. Accordingly, it appears that under the statutory scheme each agency will be represented by
26 the New York Attorney General in this matter for discovery.

27 Importantly, the New York Attorney General’s arguments do not negate the fact that all of
28 the New York agencies at issue here must notify the New York Attorney General if any property or

1 interest of the state must be defended: “[n]o action or proceeding affecting the property or interests
2 of the state shall be instituted, defended or conducted by any department, bureau, board, council,
3 officer, agency or instrumentality of the state, without a notice to the attorney-general apprising him
4 of the said action or proceeding, the nature and purpose thereof, so that he may participate or join
5 therein if in his opinion the interests of the state so warrant.” N.Y. Exec. Law § 63(1). This
6 arrangement indicates strongly that the New York Attorney General, in fulfilling its statutory role
7 for the state agencies, would necessarily and inherently have access to and control over the necessary
8 documents for effective legal representation of these state agencies.

9 The Court recognizes that this is a somewhat unusual situation, in which a law enforcement
10 organization, the attorney general, is a party to the case while also acting as counsel for a third party.
11 However, this would not be the first time that a legal services provider, as counsel for a party, is
12 found to have control over third party documents for purposes of discovery. *See, e.g., Becnel*, 2018
13 WL 691649, at *4 (“Both Salas individually and his law firm, the subpoena recipients and
14 defendants in this court, are counsel of record for the Salas defendants in the Florida lawsuit
15 Thus, a Rule 34 request for production to Salas in the Florida lawsuit required Salas to respond as
16 to responsive materials over which Salas and his law firm had possession, custody or control.”).
17 Indeed, one court has noted that “[i]n general, an attorney is presumed to have control over
18 documents in its client’s possession.” *Perez*, 2014 WL 1796661, at *2. The Court is not holding
19 broadly that there must be a finding of a legal right of access to and thus control over third party
20 client documents in every case involving a legal services provider as a party; rather, under the
21 particular facts here, and under the totality of circumstances viewed in light of applicable legal
22 standards, the Court finds that control exists here.

23 The New York Attorney General’s role as counsel for the agencies at issue inherently
24 involves obtaining necessary documents for effective representation in litigation. In acting as
25 counsel, the New York Attorney General would necessarily have access to and thus control over the
26 relevant documents needed to respond to discovery requests. *See Monsanto*, 2023 WL 4083934, at
27 *5–6 (finding state Attorney General has control over agency documents “based on his broad
28 statutory and common law powers to control and manage legal affairs on behalf of state agencies,

1 has a legal right to obtain responsive documents from the state agencies referenced in the
2 Complaint”).

3 Further, the New York Attorney General argues that the New York Attorney General is a
4 separate and distinct elected entity with separate duties and responsibilities. Dkt. 738-24 at 2 (“The
5 [New York Attorney General] NYAG is an independently-elected official, and unlike almost all
6 other executive branch officers, including the heads of the state entities Meta identified, does not
7 necessarily act pursuant to the directives of the [New York] Governor.”). However, this argument
8 misapprehends the “legal control” test for documents – the issue is not simply whether one entity is
9 under the day-to-day operational control of the other (such as a parent-wholly-owned-subsidiary
10 relationship), and not simply whether the two entities are legally separate (such as two different and
11 separately incorporated entities), but rather whether there is a legal right to obtain the documents as
12 explained by *Citric Acid*. ““The control analysis for Rule 34 purposes does not require the party to
13 have actual managerial power over the foreign corporation, but rather that there be close
14 coordination between them.”” *St. Jude Medical S.C., Inc.*, 305 F.R.D. at 638. Here, the attorney-
15 client relationship between the state Attorney General and the state agencies (a relationship
16 mandated by state law) necessitates close coordination. While operational control may be a factual
17 situation which demonstrates a legal right to obtain the documents, the absence of such “executive
18 or functional control” is not determinative for evaluating “control” for purposes of discovery. By
19 definition, the “legal control” issue for discovery arises when there are two legally distinct or
20 separate entities – otherwise, if only one entity were involved, there would be no dispute that party
21 discovery covered that one entity. As discussed above, courts have found “control” for purposes of
22 discovery where a party is clearly not in managerial control over the third-party, such as a subsidiary
23 having control over the documents of a parent corporation, or an individual government officer
24 having control over the documents of an entire agency.

25 Relatedly, the New York Attorney General argues that “[s]ome pre-suit [New York Attorney
26 General] communications with such entities, therefore, may be privileged. The [New York Attorney
27 General] does not, however, represent any of the state entities Meta has identified in this litigation,
28 so no pre-suit communications arising out of this litigation are attorney-client privileged.” [Dkt.

738-24 at 2]. That statement, however, is silent as to (and thus appears artfully drafted to leave open the possibility) whether the New York Attorney General will assert privilege with respect to post-suit communications. The Court rejects the New York Attorney General’s attempt to simultaneously disclaim the existence of an attorney-client privilege for pre-suit communications, while apparently attempting to preserve the ability to assert the privilege applies to post-suit communications. “[T]o the extent that [the State] asserts an attorney-client privilege with these legislators, it does so solely in their official capacities [I]t is inconsistent for the State to argue that on one hand the [State] Attorney General represents these individuals, but that for discovery purposes the [Plaintiff] United States must resort to Federal Rule of Civil Procedure 45.” *Perez*, 2014 WL 1796661, at *2. To the extent the New York Attorney General implies its intention to assert that the attorney-client privilege would apply to communications between the New York Attorney General’s office and the agencies at issue, that further supports the conclusion of control here. Assertion of the attorney-client privilege requires, as a prerequisite, the existence of an attorney-client relationship. *See Graf*, 610 F.3d at 1156.

The New York Attorney General’s reliance on *New York ex rel. Boardman v. Nat’l R.R. Passenger Corp.*, 233 F.R.D. 259, 263 (N.D.N.Y. 2006) [hereinafter *Boardman*], does not dictate a different result. [Dkt. 738-24 at 2]. The *Boardman* Court recognized that “control in the context of discovery is to be broadly construed.” *Id.* at 267–68. The *Boardman* Court properly recognized that “[t]he burden of establishing control over the documents being sought rests with the demanding party.” *Id.* Critically, the finding of lack of control by one New York agency over the documents of another agency resulted from an express failure by the moving party (Amtrak) to meet its burden: “Amtrak’s contention that [state agency] DOT has possession, custody, and control of [second state agency] OSC’s records **is supported by nothing more than hypotheses.**” *Id.* (emphasis added). Here, by contrast, the record submitted to the Court is not mere hypotheses, as evident from the extended discussion in this Order. To the extent the New York Attorney General attempts to extrapolate from *Boardman* a general rule that no state agency can ever have control over the documents of another state agency, that argument is belied by *Boardman* itself: “The determination of control is often fact specific and thus generalizations, as [*Compagnie Francaise d’Assurance*

1 *Pour le Com. Exterieur*’s pronouncement seems to have done, are difficult to apply across the
2 board.” *Id.* at 267 (citing *Compagnie Francaise d’Assurance Pour le Com. Exterieur*, 105 F.R.D.
3 16).

4 The fact that several other New York courts have found a state agency has control over the
5 documents over another agency for purposes of discovery confirms that the issue of “control” is
6 often case and fact specific. *See, e.g., Compagnie Francaise d’Assurance Pour le Com. Exterieur*,
7 105 F.R.D. at 35; *see also In re Opioid Litigation*, No. 400000/2017, 2019 WL 4120096, at *1 (N.Y.
8 Sup. Ct. Aug. 14, 2019) (finding control and distinguishing *Boardman* “easily”); *see also Gross v.*
9 *Lunduski*, 304 F.R.D. 136, 141–44 (W.D.N.Y. 2014) (distinguishing *Boardman* and finding named
10 defendant, individual corrections officer, has “control” over documents of N.Y. Department of
11 Correctional and Community Services in part because New York State Attorney General was
12 representing both defendant and agency); *see also Guillory v. Skelly*, No. 12-CV-00847S F, 2014
13 WL 4542468, at *8–9 (W.D.N.Y. Sept. 11, 2014) (distinguishing *Boardman* and finding named
14 defendants, individual corrections officers, have “control” over documents of N.Y. Department of
15 Correctional and Community Services); *see also Siano Enders v. Boone*, No. 1:19-CV-948
16 (BKS/CFH), 2021 WL 3471558, at *3-4 (N.D.N.Y. Aug. 6, 2021) (finding named defendants,
17 individual retired employees of N.Y. agency, have control over documents of their former employer-
18 agency); *cf. also United States v. UBS Sec. LLC*, No. 118CV6369RPKPK, 2020 WL 7062789, at
19 *4–7 (E.D.N.Y. Nov. 30, 2020) (finding that named party, the United States, has control over
20 documents of agencies (HUD and Treasury)); *cf. also Loc. 3621, EMS Officers Union, DC-37,*
21 *AFSCME, AFL-CIO v. City of New York*, No. 18CV4476LJLJW, 2023 WL 8804257, at *11
22 (S.D.N.Y. Dec. 30, 2023) (finding that named party, City of New York, has control over documents
23 of city agencies (NYCAPS, DCAS, Fire Department of New York, “or any other City department
24 or agency”)).

25 Therefore, the Court concludes that the New York Attorney General has legal control, for
26 the purposes of discovery, over the documents held by the New York agencies listed by Meta.

27 **XXIV. NORTH CAROLINA**

28 In opposition to the control issue, the North Carolina Attorney General argues primarily the

1 following factors: (1) the North Carolina Attorney General is a separate entity and independent from
2 the North Carolina agencies; (2) the heads of North Carolina agencies are statutorily responsible for
3 the “legal custody of all books, papers, documents and other records of the department;” and (3) the
4 North Carolina Attorney General is not authorized to make decisions in areas which have been
5 specifically delegated to a designated department. [Dkt. 738-25 at 2].

6 In support of a finding of control with regard to these state agencies’ documents, Meta argues
7 based primarily on the following factors: (1) in general the North Carolina Attorney General is
8 required to represent all state agencies, and (2) North Carolina agencies are proscriptively barred
9 from obtaining counsel other than the North Carolina Attorney General, without consent from the
10 North Carolina Attorney General. *Id.* at 3. Here, Meta seeks discovery from the following agencies:
11 Department of Commerce, Department of Health and Human Services, Department of Public
12 Instruction, Office of Governor, and Office of State Budget and Management. *Id.*

13 After considering the factors argued in the briefs, the Court finds that the factors weigh in
14 favor of a finding that the North Carolina Attorney General has legal control, for purposes of
15 discovery, over the listed North Carolina agencies. While the North Carolina Attorney General is a
16 separate entity from the state agencies, this does not outweigh the requirement that the North
17 Carolina Attorney General will act as the agencies’ counsel and will thus have access to the
18 documents.

19 The statutory scheme in North Carolina requires the North Carolina Attorney General “[t]o
20 represent all State departments, agencies, institutions, commissions, bureaus or other organized
21 activities of the State which receive support in whole or in part from the State.” N.C. Gen. Stat.
22 § 114-2. More importantly, North Carolina law prohibits state agencies from employing separate
23 counsel (subject to an exception not evident here): “No department, officer, agency, institution,
24 commission, bureau or other organized activity of the State which receives support in whole or in
25 part from the State shall employ private counsel, except with the approval of the Governor. The
26 Governor shall give his approval only if the Attorney General has advised him . . . that it is
27 impracticable for the Attorney General to render the legal services.” N.C. Gen. Stat. § 147-17.
28 There is nothing in the North Carolina Attorney General’s submissions to this Court indicating that

1 the North Carolina Attorney General has advised the Governor that representing the agencies is
2 impracticable here, and there is nothing in the record to indicate that the Governor has approved
3 separate counsel being retained by the state agencies. And given the circumstances of this case there
4 is no basis to even suspect that the North Carolina Attorney General has a conflict of interest with
5 any of the listed state agencies in relation to this Multi-District Litigation. Further, as noted, no
6 separate counsel has appeared for any state agencies in this case.

7 Indeed, the North Carolina Attorney General confirmed that its office could represent all but
8 one of the listed agencies if Meta were to serve those agencies with a subpoena in this matter. [Dkt.
9 738-1 at 22]. And as to that one agency (the North Carolina Department of Commerce), there is
10 nothing in the record to indicate how or why that agency would be permitted to retain separate
11 counsel for this case under § 147-17, and the North Carolina Attorney General's briefing does not
12 adequately explain why they represent confusingly to the Court that they would not represent that
13 agency. When evaluating this issue, the Court determines that the plain language of the statute
14 should control, as opposed to the unexplained statement of counsel. The statutory scheme in North
15 Carolina makes clear the North Carolina legislature's strong preference that state agencies be
16 represented by the North Carolina Attorney General. This arrangement indicates strongly that the
17 North Carolina Attorney General, in fulfilling its statutory role to carry out its duties to represent all
18 agencies, would necessarily and inherently have access to and control over the necessary documents
19 for effective legal representation of these state agencies.

20 Further, there is no statutory, legal, or administrative rule cited which prohibits the North
21 Carolina Attorney General from accessing the documents of the state agencies at issue. The North
22 Carolina Attorney General argues that "agency documents, not all of which are public records, are
23 under the legal control of separately elected constitutional officers and each agency has their own
24 separate processes for responding to public records requests[.]" [Dkt. 738-25 at 2]. This argument
25 is based on an incorrect assumption that "public records" laws and processes are the only way in
26 which the North Carolina Attorney General can obtain documents from the state agencies when they
27 are clients of the lawyers of that office. A public records law does not amount to a statutory or legal
28 prohibition on the North Carolina Attorney General from accessing the documents in the scope of

1 its representation of the agencies as clients. If the North Carolina Attorney General’s supposition
2 that, every time the North Carolina Attorney General seeks documents from state agencies, a public
3 records Act requests would be routine and necessary, then the logical conclusion is that the public
4 records law would be a routinely used legal right to access those documents and records of the
5 agency subject to the Act. At least one court has found that a state “public records” Freedom of
6 Information Act constitutes a legal right to access documents from an agency for purposes of
7 “control” under Rule 34. *See Flagg*, 252 F.R.D. at 355–57 (“Because at least some of the text
8 messages maintained by [(third party)] SkyTel are ‘public records’ within the meaning of
9 Michigan’s FOIA, it would be problematic, to say the least, to conclude that the [named defendant]
10 City lacks a legal right to obtain these records as necessary to discharge its statutory duty of
11 disclosure.”). However, the North Carolina Attorney General cites no law supporting the view that
12 a public records request is the only way for the North Carolina Attorney General to get documents
13 from state agencies when they are clients. [Dkt. 738-25 at 2]. If the North Carolina Attorney
14 General were correct, then the North Carolina Attorney General would have to submit a public
15 records request every time the lawyers of that office were representing a state agency, to get
16 documents from their own client – which is not merely impractical but also contrary to the principles
17 of effective legal representation. As counsel, the North Carolina Attorney General will have the
18 normal type of direct access to the necessary documents from its own clients, without resorting to
19 public channels, ensuring efficient and comprehensive legal support for the agencies involved
20 consistent with the ethical obligations and applicable rules of professional conduct. The North
21 Carolina open records law is not an impediment to that access, because public records requests apply
22 to records which are to be produced for public inspection (and not for purposes of litigation such as
23 this case in which there is a Protective Order limiting public availability of confidential documents).

24 The Court recognizes that this is a somewhat unusual situation, in which a law enforcement
25 organization, the attorney general, is both a party to the case while also acting or able to act as
26 counsel for a third party. However, this would not be the first time that a legal services provider, as
27 counsel for a party, is found to have control over third party documents for purposes of discovery.
28 *See, e.g., Becnel*, 2018 WL 691649, at *4 (“Both Salas individually and his law firm, the subpoena

1 recipients and defendants in this court, are counsel of record for the Salas defendants in the Florida
2 lawsuit Thus, a Rule 34 request for production to Salas in the Florida lawsuit required Salas
3 to respond as to responsive materials over which Salas and his law firm had possession, custody or
4 control.”). Indeed, one court has noted that “[i]n general, an attorney is presumed to have control
5 over documents in its client’s possession.” *Perez*, 2014 WL 1796661, at *2. The Court is not
6 holding broadly that there must be a finding of a legal right of access to and thus control over third
7 party client documents in every case involving a legal services provider as a party; rather, under the
8 particular facts here, and under the totality of circumstances viewed in light of applicable legal
9 standards, the Court finds that control exists here.

10 The North Carolina Attorney General’s role as counsel for the agencies at issue inherently
11 involves obtaining necessary documents for effective representation in litigation. In acting as
12 counsel, the North Carolina Attorney General would necessarily have access to and thus control
13 over the relevant documents needed to respond to discovery requests. *See Monsanto*, 2023 WL
14 4083934, at *5–6 (finding state Attorney General has control over agency documents “based on his
15 broad statutory and common law powers to control and manage legal affairs on behalf of state
16 agencies, has a legal right to obtain responsive documents from the state agencies referenced in the
17 Complaint”).

18 To the extent the North Carolina Attorney General argues that the North Carolina Attorney
19 General is a “separate principal departments headed by the independently elected Governor,” dkt.
20 738-25 at 2, that argument misapprehends the “legal control” test for documents – the issue is not
21 simply whether one entity is under the day-to-day operational control of the other (such as a parent-
22 wholly-owned-subsidary relationship), and not simply whether the two entities are legally separate
23 (such as two different and separately incorporated entities), but rather whether there is a legal right
24 to obtain the documents as explained by *Citric Acid*. ““The control analysis for Rule 34 purposes
25 does not require the party to have actual managerial power over the foreign corporation, but rather
26 that there be close coordination between them.”” *St. Jude Medical S.C., Inc.*, 305 F.R.D. at 638.
27 Here, the attorney-client relationship between the state Attorney General and the state agencies (a
28 relationship mandated by state law) necessitates close coordination. While operational control may

1 be a factual situation which demonstrates a legal right to obtain the documents, the absence of such
2 “executive or functional control” is not determinative for evaluating “control” for purposes of
3 discovery. By definition, the “legal control” issue for discovery arises when there are two legally
4 distinct or separate entities – otherwise, if only one entity were involved, there would be no dispute
5 that party discovery covered that one entity. As discussed above, courts have found “control” for
6 purposes of discovery where a party is clearly not in managerial control over the third-party, such
7 as a subsidiary having control over the documents of a parent corporation, or an individual
8 government officer having control over the documents of an entire agency. Thus, arguing that the
9 North Carolina Attorney General “does not represent any state agencies in this action and brings
10 this action in the public interest under North Carolina’s consumer protection laws[,]” dkt. 738-25 at
11 2, is simply re-stating the issue to be decided, and not determinative of the issue. The North Carolina
12 Attorney General’s arguments erroneously conflate the legal control issue with “operational
13 control” or “functional independence” of each entity, and thus is insufficient to rebut a finding of
14 legal control of the documents for purposes of discovery.

15 The Court is not persuaded by the North Carolina Attorney General’s argument that North
16 Carolina law does not authorize the Attorney General “to make decisions in areas which have been
17 specifically delegated to a designated department,” dkt. 738-25 at 2 (citing *Tice v. Dep’t. of Transp.*,
18 312 S.E2d 241, 245 (N.C. Ct. App. 1984)). That argument does not mandate a different result over
19 “control” for purposes of discovery. Nothing in North Carolina law “specifically delegates” to the
20 listed state agencies the handling of discovery issues surrounding the production of documents in a
21 civil matter. The fact that agencies may have their own internal procedures for handling public
22 records requests is irrelevant, as noted above, because such public records procedures are not the
23 only method by which the North Carolina Attorney General can obtain documents from state
24 agencies in the course of representing them in litigation. Indeed, under North Carolina law, because
25 the North Carolina Attorney General is specifically mandated to represent the state agencies in
26 litigation, if anything the cited *Tice* case supports the view that handling this discovery issue is
27 properly within the legislatively-mandated scope of duties of the North Carolina Attorney General.
28 To the extent the *Tice* opinion reflects the concept that, for policy and operational duties, each

1 agency is structurally independent, again that is simply another irrelevant reiteration and confusion
2 of “managerial power” with “control” for purposes of discovery.

3 Furthermore, at least one other federal court has previously found that the North Carolina
4 Attorney General has legal control over North Carolina state agency materials. *Generic*
5 *Pharmaceuticals (II)*, 699 F. Supp. 3d at 357–58. While this Court reaches its own independent
6 conclusions consistent with the applicable legal standards discussed above and in light of the facts
7 and circumstances presented here, the analysis in the *Generic Pharmaceuticals (II)* Multi-District
8 Litigation is certainly consistent with, and to that extent further persuasively supports, the
9 conclusion here with regard to the North Carolina Attorney General’s having control with regard to
10 documents of the state agencies at issue. Given that the *Generic Pharmaceuticals (II)* opinion
11 resolved the control issue against all the objecting states including North Carolina, this Court is
12 disappointed that the North Carolina Attorney General and Meta here were unable to reach a
13 negotiated resolution of this dispute, which other states were able to do in *Generic Pharmaceuticals*
14 *(II)*. As the Court has repeatedly encouraged the Parties at multiple Discovery Management
15 Conferences, they should make every effort to work out discovery disputes through reasonable,
16 good faith negotiations between able and experienced counsel, particularly where, as here, there is
17 guidance in precedent on the discovery issue at hand.

18 Therefore, the Court concludes that the North Carolina Attorney General has legal control,
19 for the purposes of discovery, over the documents held by the North Carolina agencies listed by
20 Meta, including in particular the three agencies recently listed in the intent to issue subpoenas.

21 **XXV. NORTH DAKOTA**

22 In opposition to the control issue, the North Dakota Attorney General argues primarily the
23 following factors: (1) the North Dakota Attorney General is a separate entity and independent from
24 the North Dakota agencies; (2) the North Dakota Attorney Generals powers are specifically
25 determined by the legislature and prescribed by law; (3) the North Dakota agencies’ ability to share
26 information with other agencies or access records of other agencies is control by state law; (4) the
27 North Dakota Attorney General does not seek relief on behalf of North Dakota agencies; and (5) the
28 North Dakota Attorney General is not automatically required to represent North Dakota agencies.

1 [Dkt. 738-26 at 2].

2 In support of a finding of control with regard to these state agencies' documents, Meta argues
3 based primarily on the following factors: (1) North Dakota agencies are proscriptively barred from
4 obtaining counsel other than the North Dakota Attorney General, without consent from the North
5 Dakota Attorney General; and (2) the North Dakota Attorney General is "expressly allowed to
6 'access and examine any record under the control of the state board of higher education' in the
7 course of representing that board." *Id.* at 3. Here, Meta seeks discovery from the following
8 agencies: the Department of Commerce, Department of Health and Human Services, Department of
9 Public Instruction, Department of Education Standards and Practices Board, Office of Management
10 and Budget, and Office of the Governor. *Id.*

11 After considering the factors argued in the briefs, the Court finds that the factors weigh in
12 favor of a finding that the North Dakota Attorney General has legal control, for purposes of
13 discovery, over the listed North Dakota agencies. While no specific statute exists that explicitly
14 grants the North Dakota Attorney General access to the documents from the North Dakota agencies,
15 the North Dakota Attorney General will act as counsel to these state agencies, subject to such request
16 which appears certain based on the record, and will thus have control over the documents. The
17 Court repeatedly asked the state Attorneys General whether they have spoken with the agencies at
18 issue, and they chose not to. No separate counsel has entered appearance for these state agencies.
19 Accordingly, the record before the Court is that all of the agencies at issue will be represented by
20 the North Dakota Attorney General.

21 The statutory scheme in North Dakota requires that the North Dakota Attorney General shall
22 "[a]pppear and defend all actions and proceedings against any state officer in the attorney general's
23 official capacity in any of the courts of this state or of the United States." N.D. Cent. Code § 54-
24 12-01. Indeed, the North Dakota Attorney General confirmed that its office could represent all of
25 the listed agencies if Meta were to serve those agencies with a subpoena in this matter. [Dkt. 738-
26 1 at 22]. Importantly, the North Dakota Attorney General's arguments do not negate the fact that
27 all of the North Dakota agencies at issue here are barred by North Dakota law from obtaining counsel
28 other than the North Dakota Attorney General: "[a] state . . . agency may not employ legal counsel,

1 and no person may act as legal counsel in any matter, action, or proceeding in which the state . . .
2 agency is interested or is a party, except upon written appointment by the attorney general.” N.D.
3 Cent. Code § 54-12-08. This statutory scheme makes plain the North Dakota Legislature’s strong
4 preference that the North Dakota Attorney General will represent state agencies in cases such as this
5 Multi-District Litigation. As a result, this arrangement indicates strongly that the North Dakota
6 Attorney General, in fulfilling its statutory role to appear and defend all action for the state agencies,
7 would necessarily and inherently have access to and control over the necessary documents for
8 effective legal representation of these state agencies. Therefore, the Court concludes that the North
9 Dakota Attorney General has legal control, for the purposes of discovery, over the documents held
10 by the North Dakota agencies listed by Meta, including in particular the three agencies recently
11 listed in the intent to issue subpoenas.

12 Further, there is no statutory, legal, or administrative rule cited which prohibits the North
13 Dakota Attorney General from accessing the documents of the state agencies at issue. Meta argues
14 that North Dakota law specifically grants the North Dakota Attorney General the statutory right to
15 “access and examine any record under the control of the state board of higher education” when
16 appointed to represent that agency or an institution under the control of the state board of higher
17 education. [Dkt. 738-26 at 3 (citing N.D. Cent. Code § 54-12-08(4)]. However, the North Dakota
18 State Board of Higher Education is in charge of the university system in North Dakota and does not
19 appear to be one of the agencies at issue in this case for discovery. Accordingly, Meta’s reliance on
20 the cited statute is irrelevant and fails to show a legal right of access for the documents of the
21 agencies at issue here.

22 The North Dakota Attorney General’s role as counsel for the agencies at issue inherently
23 involves obtaining necessary documents for effective representation in litigation, as explained
24 above. In acting as counsel, the North Dakota Attorney General would necessarily have access to
25 and thus control over the relevant documents needed to respond to discovery requests. *See*
26 *Monsanto*, 2023 WL 4083934, at *5–6 (finding state Attorney General has control over agency
27 documents “based on his broad statutory and common law powers to control and manage legal
28 affairs on behalf of state agencies, has a legal right to obtain responsive documents from the state

1 agencies referenced in the Complaint”).

2 The Court recognizes that this is a somewhat unusual situation, in which a law enforcement
3 organization (the attorney general) is both a party to the case while also acting or able to act as
4 counsel for a third party. However, this would not be the first time that a legal services provider, as
5 counsel for a party, is found to have control over third party documents for purposes of discovery.
6 *See, e.g., Becnel*, 2018 WL 691649, at *4 (“Both Salas individually and his law firm, the subpoena
7 recipients and defendants in this court, are counsel of record for the Salas defendants in the Florida
8 lawsuit Thus, a Rule 34 request for production to Salas in the Florida lawsuit required Salas
9 to respond as to responsive materials over which Salas and his law firm had possession, custody or
10 control.”). Indeed, one court has noted that “[i]n general, an attorney is presumed to have control
11 over documents in its client’s possession.” *Perez*, 2014 WL 1796661, at *2. The Court is not
12 holding broadly that there must be a finding of a legal right of access to and thus control over third
13 party client documents in every case involving a legal services provider as a party; rather, under the
14 particular facts here, and under the totality of circumstances viewed in light of applicable legal
15 standards, the Court finds that control exists here.

16 The North Dakota Attorney General argues that its powers are conferred by the North Dakota
17 Constitution, and because the North Dakota Constitution has not explicitly conferred access to
18 agency documents, the North Dakota Attorney General does not have legal control over the
19 documents. [Dkt. 738-26 at 2]. However, the North Dakota Attorney General does not cite to any
20 statutory or legal prohibition on the North Dakota Attorney General’s representing the state agencies
21 for purposes of discovery (and accessing their clients’ documents in the course of such
22 representation). To the extent the North Dakota Attorney General argues that the North Dakota
23 Attorney General separate and distinct elected entity with separate duties and responsibilities, *see*
24 dkt. 738-26 at 2, that argument misapprehends the “legal control” test for documents – the issue is
25 not simply whether one entity is under the day-to-day operational control of the other (such as a
26 parent-wholly-owned-subsidiary relationship), and not simply whether the two entities are legally
27 separate (such as two different and separately incorporated entities), but rather whether there is a
28 legal right to obtain the documents as explained by *Citric Acid*. . ““The control analysis for Rule

34 purposes does not require the party to have actual managerial power over the foreign corporation, but rather that there be close coordination between them.” *St. Jude Medical S.C., Inc.*, 305 F.R.D. at 638. Here, the attorney-client relationship between the state Attorney General and the state agencies (a relationship mandated by state law) necessitates close coordination. While operational control may be a factual situation which demonstrates a legal right to obtain the documents, the absence of such “executive or functional control” is not determinative for evaluating “control” for purposes of discovery. By definition, the “legal control” issue for discovery arises when there are two legally distinct or separate entities – otherwise, if only one entity were involved, there would be no dispute that party discovery covered that one entity. As discussed above, courts have found “control” for purposes of discovery where a party is clearly not in managerial control over the third-party, such as a subsidiary having control over the documents of a parent corporation, or an individual government officer having control over the documents of an entire agency. Thus, arguing that the North Dakota Attorney General “brought this action in a law enforcement capacity, pursuant to statutory authority, to enjoin unlawful practices. The [North Dakota Attorney General] alone decides whether to bring such an action[,]” dkt. 738-26 at 2, is simply re-stating the issue to be decided, and not determinative of the issue. The North Dakota Attorney General’s arguments erroneously conflate the legal control issue with “operational control” or “functional independence” of each entity, and thus is insufficient to rebut a finding of legal control of the documents for purposes of discovery.

Relatedly, the North Dakota Attorney General has taken the position that communications between the North Dakota Attorney General and these state agencies would be covered by the attorney-client privilege. Dkt. 738-26 at 2 (“Communications between other [North Dakota Attorney General’s] divisions and client state agencies may be privileged if it is an active litigation record, attorney work product, or attorney consultation.”). To the extent the North Dakota Attorney General has attempted to subdivide its own office between the team litigating this case and other “agency counsel sections” in order to somehow argue that the scope of attorney-client privilege is limited only as to some parts of the state North Dakota General’s office but not other sub-teams, that argument is not supported by citation to law and is contrary to the weight of law. The scope of

1 attorney-client relationship (and the duties flowing therefrom, including the scope of the attendant
2 attorney-client privilege) encompasses the entirety of a legal services organization due to well-
3 known rules of imputation of confidences to a legal services organization, including a public law
4 office. *See, e.g., People ex rel. Peters*, 951 P.2d at 930 (“The rule of imputed disqualification applies
5 to both private firms and public law firms such as a district attorney’s office or the office of the state
6 public defender.”); *accord City of Cnty. of Denver*, 37 P.3d at 457; *see also Kirk*, 108 Cal. Rptr. 3d
7 at 637–38, 642 (“We do not doubt that vicarious disqualification is the general rule, and that we
8 should presume knowledge is imputed to all members of a tainted attorney’s law firm. However,
9 we conclude that, in proper circumstances, the presumption is a rebuttable one[.]” The court
10 recognizing presumption of imputed knowledge in the context of government attorneys, which
11 presumption could be rebutted by proper ethical screening); *cf. also Billings*, 441 S.E.2d at 266
12 (because individual government lawyer at issue “should be screened from any direct or indirect
13 participation in the matter,” vicarious disqualification of entire office denied); *cf. also Calhoun*, 492
14 S.W.3d at 137 (individual lawyer disqualified when joining prosecutors’ office but “the entire office
15 in which that attorney works is not disqualified as long as the disqualified attorney is appropriately
16 screened. Disqualification of the entire prosecuting office is not necessary absent special facts, such
17 as a showing of actual prejudice; or, perhaps the screening procedures are ineffective.”). Some
18 jurisdictions treat public legal service organizations like private law firms and impute shared
19 confidences among lawyers of the entire public law entity. Even in jurisdictions which do not
20 automatically impute disqualification, and shared confidences, to an entire public law office, those
21 courts recognize that ethical screening or other procedures are required out of recognition that actual
22 (as opposed to imputed) sharing of confidences may occur and such procedures are required to avoid
23 dissemination of attorney-client privileged communications within an entire public law
24 organization. This review of case law demonstrates that no courts support North Dakota’s argument
25 that different individual lawyers in the North Dakota Attorney General’s office have *ex ante*
26 separable, discrete attorney-client relationships.

27 The Court rejects the North Dakota Attorney General’s attempt to simultaneously disclaim
28 the existence of an attorney-client privilege as between the “division” of attorneys currently working

1 on this case, while apparently attempting to preserve the ability to assert that the privilege applies
2 to communications between other lawyers in other “divisions” of the North Dakota Attorney
3 General’s Office and these agencies. “[T]o the extent that [the State] asserts an attorney-client
4 privilege with these legislators, it does so solely in their official capacities [I]t is inconsistent
5 for the State to argue that on one hand the [State] Attorney General represents these individuals, but
6 that for discovery purposes the [Plaintiff] United States must resort to Federal Rule of Civil
7 Procedure 45.” *Perez*, 2014 WL 1796661, at *2. The fact that the North Dakota Attorney General
8 is attempting to preserve the ability to assert the attorney-client privilege between the North Dakota
9 Attorney General’s office and the agencies at issue further supports the conclusion of control here.
10 Assertion of the attorney-client privilege requires, as a prerequisite, the existence of an attorney-
11 client relationship. *See Graf*, 610 F.3d at 1156.

12 Instructive on the control issue is the District of North Dakota’s opinion in *North Dakota v.*
13 *United States*, No. 1:19-CV-150, 2021 WL 6278456 (D.N.D. Mar. 24, 2021). In that case, the State
14 of North Dakota, represented by the North Dakota Attorney General, served document requests on
15 the United States, and expressly argued that several federal agencies should be the subject of party
16 discovery. *Id.* at *2. The United States objected, taking positions strikingly similar to the North
17 Dakota Attorney General in this Multi-District Litigation, and argued that North Dakota should seek
18 documents from such listed agencies by subpoena under Rule 45 instead. *Id.* After reviewing
19 multiple cases involving whether federal agencies should be subject to party discovery when the
20 United States is the named party, the North Dakota district court held that while those precedents
21 “all involved circumstances quite different from those of this case, each involved the United States
22 as a party, and each followed the principle that the United States’ obligation to respond to discovery
23 requests is not limited to an agency named in the action. This order need not, and therefore does
24 not, consider whether North Dakota can recover for any acts of employees of agencies other than
25 the USACE. Even if North Dakota’s recovery is limited to negligent acts of USACE employees,
26 that would not foreclose North Dakota from seeking discovery from other federal agencies who
27 possess relevant information.” *Id.* at *4. It is noteworthy that, in *North Dakota v. United States*, the
28 North Dakota Attorney General argued that government agencies should be subject to party

1 discovery when the sovereign is a named party and succeeded in that argument when seeking
2 discovery from another sovereign. *See id.* at *2–4. The fact that the North Dakota Attorney General
3 is now arguing the exact opposite position, when its sovereign is a party and its agencies are the
4 target of discovery, undercuts the persuasive force of the arguments presented. The analogous result
5 in *North Dakota v. United States* supports the finding of “control” for purposes of discovery here.

6 Given the North Dakota federal court’s decision in the analogous *North Dakota v. United*
7 *States* case (which the North Dakota Attorney General was involved in as counsel), this Court is
8 disappointed that the North Dakota Attorney General and Meta were unable to reach a negotiated
9 resolution of this dispute, which other states were able to do in *Generic Pharmaceuticals (II)*. As
10 the Court has repeatedly encouraged the Parties at multiple Discovery Management Conferences,
11 they should make every effort to work out discovery disputes through reasonable, good faith
12 negotiations between able and experienced counsel, particularly where, as here, there is guidance in
13 precedent on the discovery issue at hand.

14 Therefore, the Court concludes that the North Dakota Attorney General has legal control,
15 for the purposes of discovery, over the documents held by the North Dakota agencies listed by Meta.

16 **XXVI. OHIO**

17 In opposition to the control issue, the Ohio Attorney General’s primary substantive argument
18 is that the Ohio Attorney General is a separate entity and independent from the Ohio agencies. [Dkt.
19 738-27 at 2].

20 In support of a finding of control with regard to these state agencies’ documents, Meta argues
21 based primarily on the following factors: (1) Ohio agencies are proscriptively barred from obtaining
22 counsel other than the Ohio Attorney General; and (2) Ohio state law mandates that Ohio agencies
23 furnish documents to the Ohio Attorney General. *Id.* at 3. Here, Meta seeks discovery from the
24 following agencies: the Department of Children and Youth, Department of Development,
25 Department of Education & Workforce, Department of Health, Department of Higher Education,
26 Department of Job and Family Services, Department of Mental Health & Addiction Services,
27 Department of Youth Services, Office of Budget and Management, and Office of Governor. *Id.*

28 After considering the factors argued in the briefs, the Court finds that the factors weigh in

1 favor of a finding that the Ohio Attorney General does have legal control, for purposes of discovery,
2 over the listed Ohio agencies. While the Ohio Attorney General is a separate entity, this does not
3 outweigh the requirement that the Ohio Attorney General will act as the agencies' counsel and that
4 Ohio state law explicitly mandates that Ohio agencies furnish documents to the Ohio Attorney
5 General.

6 There is no statutory, legal, or administrative rule cited which prohibits the Ohio Attorney
7 General from accessing the documents of the state agencies at issue. To the contrary, "[p]ublic
8 officers and their deputies, assistants, clerks, subordinates, and employees shall render and furnish
9 to the attorney general, or to the attorney general's designated representatives when so requested,
10 all information and assistance in their possession or within their power." Ohio Rev. Code §
11 1331.16(N). Unlike other states, the Ohio legislature explicitly created a legal right for the Ohio
12 Attorney General to access state agencies' documents. For purposes of establishing "legal control"
13 over documents, "[d]ecisions from within this circuit have noted the importance of a legal right to
14 access documents created by *statute*, affiliation or employment." *In re Legato Sys., Inc. Sec. Litig.*,
15 204 F.R.D. at 170 (emphasis added) (finding "legal control" and ordering party to obtain and
16 produce transcript not within current possession where federal regulation, 17 C.F.R. § 203.6, grants
17 legal right to ask for and obtain transcript of testimony from SEC); *see also In re ATM Fee Antitrust*
18 *Litig.*, 233 F.R.D. at 545 (finding "a bank holding company necessarily controls its subsidiary
19 banks" and thus has "legal control" of documents of bank by virtue of the Bank Holding Company
20 Act, 12 U.S.C. § 1841(a)(1)). Thus, the cited statute expressly grants the Ohio Attorney General an
21 explicit legal right to obtain and access these documents of the agencies at issue here. The Court
22 thus finds that Ohio Rev. Code § 1331.16(N) directly satisfies *Citric Acid's* requirement of a
23 showing of a legal right to access the documents of the state agencies here.

24 Further, and as a separate reason for finding "control" here, the Court notes that the statutory
25 framework in Ohio (like other States) requires that the Ohio Attorney General serve as counsel for
26 the state agencies at issue. As discussed above, the nature of the attorney-client relationship in this
27 action and under the facts here support a finding of "control" with respect to discovery of the state
28 agencies' documents.

1 First, the statutory scheme in Ohio requires that the Ohio Attorney General “is the chief law
2 officer for the state and all its departments[.]” Ohio Rev. Code § 109.02. “[T]he attorney general
3 is legal counsel for all state agencies.” *Tobacco Use Prevention & Control Found. Bd. of Trustees*
4 *v. Boyce*, 925 N.E.2d 641, 658 (Ohio Ct. App. 2009), *aff’d*, 941 N.E.2d 745 (Ohio 2010); *see also*
5 *Northeast Ohio Coal. for Homeless & Serv. Emps. Int’l Union, Loc. 1199 v. Blackwell*, 467 F.3d
6 999, 1009 (6th Cir. 2006) (“Under Ohio Rev. Code Ann. § 109.02, the Attorney General is ‘the chief
7 law officer for the state and all its departments’ and shall appear for the State in any tribunal in a
8 case in which the state is a party when required by the governor or the general assembly. The
9 Attorney General, then, is both the State’s chief legal officer and a representative of the people and
10 the public interest[.]”). Indeed, the Ohio Attorney General confirmed that its office could represent
11 the agencies at issue if Meta were to serve those agencies with a subpoena in this matter. [Dkt. 738-
12 1 at 23–24]. Accordingly, it appears that under the statutory scheme each agency will be represented
13 by the Ohio Attorney General in this matter for discovery because of the intended subpoenas.

14 There is no citation to any statutory or legal prohibition on the Ohio Attorney General’s
15 representing the state agencies in this matter for purposes of discovery. Importantly, while the Ohio
16 Attorney General certified that it “could” represent these agencies for purposes of discovery in this
17 Multi-District Litigation, that statement must be viewed in light of the statutory scheme in Ohio
18 which forbids all of the Ohio agencies at issue from obtaining other counsel: “no state officer or
19 board, or head of a department or institution of the state shall employ, or be represented by, other
20 counsel or attorneys at law.” Ohio Rev. Code § 109.02. This statutory scheme makes plain the
21 Ohio Legislature’s mandate (and not mere preference) that the Ohio Attorney General will represent
22 state agencies in cases such as this Multi-District Litigation. As a result, this arrangement indicates
23 strongly that the Ohio Attorney General, in fulfilling its statutory role for the state agencies, would
24 necessarily and inherently have access to and control over the necessary documents for effective
25 legal representation of these state agencies, since the Ohio Attorney General’s office must have had
26 a long and deep history of working with and representing these agencies in light of the legislative
27 mandate in favor of representation.

28 The Ohio Attorney General’s role as counsel for the agencies at issue inherently involves

1 obtaining necessary documents for effective representation in litigation. In acting as counsel, the
2 Ohio Attorney General would necessarily have access to and thus control over the relevant
3 documents needed to respond to discovery requests. *See Monsanto*, 2023 WL 4083934, at *5–6
4 (finding state Attorney General has control over agency documents “based on his broad statutory
5 and common law powers to control and manage legal affairs on behalf of state agencies, has a legal
6 right to obtain responsive documents from the state agencies referenced in the Complaint”).

7 Further, it is unavailing for the Ohio Attorney General to argue that the Ohio Attorney
8 General is a separate and distinct elected entity with separate duties and responsibilities from these
9 agencies. Dkt. 738-27 at 2. This argument misapprehends the “legal control” test for documents –
10 the issue is not simply whether one entity is under the day-to-day operational control of the other
11 (such as a parent-wholly-owned-subsidiary relationship), and not simply whether the two entities
12 are legally separate (such as two different and separately incorporated entities), but rather whether
13 there is a legal right to obtain the documents as explained by *Citric Acid*. . ““The control analysis
14 for Rule 34 purposes does not require the party to have actual managerial power over the foreign
15 corporation, but rather that there be close coordination between them.”” *St. Jude Medical S.C., Inc.*,
16 305 F.R.D. at 638. Here, the attorney-client relationship between the state Attorney General and
17 the state agencies (a relationship mandated by state law) necessitates close coordination. While
18 operational control may be a factual situation which demonstrates a legal right to obtain the
19 documents, the absence of such “executive or functional control” is not determinative for evaluating
20 “control” for purposes of discovery. By definition, the “legal control” issue for discovery arises
21 when there are two legally distinct or separate entities – otherwise, if only one entity were involved,
22 there would be no dispute that party discovery covered that one entity. As discussed above, courts
23 have found “control” for purposes of discovery where a party is clearly not in managerial control
24 over the third-party, such as a subsidiary having control over the documents of a parent corporation,
25 or an individual government officer having control over the documents of an entire agency.

26 The Court recognizes that this is a somewhat unusual situation, in which a law enforcement
27 organization, the attorney general, is a party to the case while also acting as counsel for a third party.
28 However, this would not be the first time that a legal services provider, as a party, is found to have

1 control over third party documents for purposes of discovery. *See, e.g., Becnel*, 2018 WL 691649,
2 at *4 (“Both Salas individually and his law firm, the subpoena recipients and defendants in this
3 court, are counsel of record for the Salas defendants in the Florida lawsuit Thus, a Rule 34
4 request for production to Salas in the Florida lawsuit required Salas to respond as to responsive
5 materials over which Salas and his law firm had possession, custody or control.”). Indeed, one court
6 has noted that “[i]n general, an attorney is presumed to have control over documents in its client’s
7 possession.” *Perez*, 2014 WL 1796661, at *2. The Court is not holding broadly that there must be
8 a finding of a legal right of access to and thus control over third party client documents in every
9 case involving a legal services provider as a party; rather, under the particular facts here, and under
10 the totality of circumstances viewed in light of applicable legal standards, the Court finds that
11 control exists here.

12 Relatedly, the Ohio Attorney General argues that “[t]here is a distinction between the
13 attorneys from the Ohio Attorney General’s office who have filed this lawsuit – all of whom are
14 assigned to the Consumer Protection Section within the office - and the attorneys from the same
15 office who may be engaged in responding to subpoenas related to this lawsuit on behalf of their
16 respective clients.” [Dkt. 738-27 at 2]. To the extent the Ohio Attorney General has attempted to
17 subdivide its own office between the team litigating this case and other “agency counsel sections”
18 in order to somehow argue that the scope of attorney-client privilege is limited only as to some parts
19 of the Ohio Attorney General’s office but not other sub-teams (and more surprisingly, argues that
20 the privilege would be asserted as against attorneys in the Consumer Protection Section), that
21 argument is not supported by citation to law and is contrary to the weight of law. The scope of
22 attorney-client relationship (and the duties flowing therefrom, including the scope of the attendant
23 attorney-client privilege) encompasses the entirety of a legal services organization due to well-
24 known rules of imputation of confidences to a legal services organization, including a public law
25 office. *See, e.g., People ex rel. Peters*, 951 P.2d at 930 (“The rule of imputed disqualification applies
26 to both private firms and public law firms such as a district attorney’s office or the office of the state
27 public defender.”); *accord City of Cnty. of Denver*, 37 P.3d at 457; *see also Kirk*, 108 Cal. Rptr. 3d
28 at 637–38, 642 (“We do not doubt that vicarious disqualification is the general rule, and that we

1 should presume knowledge is imputed to all members of a tainted attorney's law firm. However,
2 we conclude that, in proper circumstances, the presumption is a rebuttable one[.]” The court
3 recognizing presumption of imputed knowledge in the context of government attorneys, which
4 presumption could be rebutted by proper ethical screening); *cf. also Billings*, 441 S.E.2d at 266
5 (because individual government lawyer at issue “should be screened from any direct or indirect
6 participation in the matter,” vicarious disqualification of entire office denied); *cf. also Calhoun*, 492
7 S.W.3d at 137 (individual lawyer disqualified when joining prosecutors’ office but “the entire office
8 in which that attorney works is not disqualified as long as the disqualified attorney is appropriately
9 screened. Disqualification of the entire prosecuting office is not necessary absent special facts, such
10 as a showing of actual prejudice; or, perhaps the screening procedures are ineffective.”). Some
11 jurisdictions treat public legal service organizations like private law firms and impute shared
12 confidences among lawyers of the entire public law entity. Even in jurisdictions which do not
13 automatically impute disqualification, and shared confidences, to an entire public law office, those
14 courts recognize that ethical screening or other procedures are required out of recognition that actual
15 (as opposed to imputed) sharing of confidences may occur and such procedures are required to avoid
16 dissemination of attorney-client privileged communications within an entire public law
17 organization. Here, there is no indication or evidence of any such ethical screening, and it is simply
18 not realistic or credible to presume that lawyers in the Ohio Attorney General’s office representing
19 these agencies for discovery in this Multi-District Litigation would fail to coordinate with the
20 attorneys already involved in this Multi-District Litigation. It lacks even more credibility for the
21 Ohio Attorney General to argue that the attorney-client privilege would be asserted to prevent such
22 communications between lawyers in that same office where there is no basis to assume any adversity
23 as between any of the state agencies and the State (a party to this case) or the Ohio Attorney General
24 (also a party, as relator, in this case). This review of case law demonstrates that no courts support
25 Ohio’s argument that different individual lawyers in the Ohio Attorney General’s office have *ex*
26 *ante* separable, discrete attorney-client relationships which allow the privilege to be selectively
27 asserted, even as against other lawyers in the Ohio Attorney General’s office.

28 The Ohio Attorney General’s citation to and reliance on *Monsanto* as support of the

1 “separate entities” and “constitutional structure” arguments is not persuasive. [Dkt. 738-27 at 2
2 (citing *State of Ohio v. Monsanto Co.*, Hamilton C.P. No. A1801237 (Ohio Ct. Common Pleas Dec
3 2, 2020)]. The *Monsanto* opinion is a state court opinion which does not discuss *Citric Acid*, does
4 not apply the relevant federal precedent, and relies as legal support on another Ohio state court
5 opinion on the lack of interchangeability of different Ohio agencies under Ohio state law. *Id.*

6 By contrast, instructive here is the Southern District of Ohio’s opinion in *Bivens v. Lisath*,
7 No. 2:05-CV-0445, 2007 WL 2891416 (S.D. Ohio Sept. 28, 2007). In that civil rights case, an
8 inmate sued various correctional officers and officers of an Ohio state prison, all of whom (as well
9 as the non-party Ohio Department of Rehabilitation and Corrections) were represented by the Ohio
10 Attorney General - which also apparently intervened in that case as a party as well. *Id.* The Court
11 denied the request because “the documents which he [plaintiff] describes in his request (# 22) are
12 documents which would appear to be under the possession or control of the defendants in this case.
13 As a result, he need not subpoena those documents, but may simply request them through the normal
14 discovery processes that are available to parties to litigation and identified in Federal Rules of Civil
15 Procedure 26 through 37.” *Bivens*, 2007 WL 2891416, at *6. In *Bivens*, despite the fact that the
16 named individual defendant officers do not exercise executive or managerial oversight of the agency
17 at issue, the Court found “control” for purposes of discovery. Just as in this Multi-District Litigation,
18 in *Bivens* the Ohio Attorney General was both counsel to the named defendants, as well as the third-
19 party agency, and was itself a party (as intervenor much like its status as relator party here). The
20 analogous result in *Bivens* further supports the Court’s finding of “control” here.

21 Indeed, at least one other federal court has previously found that the Ohio Attorney General
22 has legal control over Ohio state agency materials. *Generic Pharmaceuticals (II)*, 699 F. Supp. 3d
23 at 357–58. While this Court reaches its own independent conclusions consistent with the applicable
24 legal standards discussed above and in light of the facts and circumstances presented here, the
25 analysis in the *Generic Pharmaceuticals (II)* Multi-District Litigation is certainly consistent with,
26 and to that extent further persuasively supports, the conclusion here with regard to the Ohio Attorney
27 General’s having control with regard to documents of the state agencies at issue. Given that the
28 *Generic Pharmaceuticals (II)* opinion resolved the control issue against all the objecting states

1 including Ohio (which the Ohio Attorney General was involved in), and given the Ohio federal
2 court's decision finding control in the analogous *Bivens* case (which the Ohio Attorney General was
3 involved in both as counsel and a party), this Court is disappointed that the Ohio Attorney General
4 and Meta were unable to reach a negotiated resolution of this dispute, which other states were able
5 to do in *Generic Pharmaceuticals (II)*. As the Court has repeatedly encouraged the Parties at
6 multiple Discovery Management Conferences, they should make every effort to work out discovery
7 disputes through reasonable, good faith negotiations between able and experienced counsel,
8 particularly where, as here, there is guidance in precedent (such as *Generic Pharmaceuticals (II)*
9 and *Bivens*) on the discovery issue at hand.

10 Therefore, the Court concludes that the Ohio Attorney General has legal control, for the
11 purposes of discovery, over the documents held by the Ohio agencies listed by Meta.

12 **XXVII. OREGON**

13 In opposition to the control issue, the Oregon Attorney General argues primarily the
14 following factors: (1) the Oregon Attorney General is a separate entity and independent from the
15 Oregon agencies; (2) the Oregon Attorney General's powers extends as far as set forth by statute or
16 Oregon common law and limited by statute or conferred upon some other official; and (3) the
17 Oregon Attorney General brought the lawsuit under its own independent law enforcement capacity.
18 [Dkt. 738-28 at 2].

19 In support of a finding of control with regard to these state agencies' documents, Meta argues
20 based primarily on the following factors: (1) that Oregon agencies are proscriptively barred from
21 obtaining counsel other than the Oregon Attorney General, without consent from the Oregon
22 Attorney General due to a conflict, and (2) that Oregon law affords the Oregon Attorney General
23 "[f]ull charge and control of all the legal business" of state agencies. *Id.* at 3. Here, Meta seeks
24 discovery from the following agencies: Business Oregon, the Office of the Governor, Department
25 of Administrative Services, Department of Consumer and Business Services, and Department of
26 Education. *Id.*

27 After considering the factors argued in the briefs, the Court finds that the factors weigh in
28 favor of a finding that the Oregon Attorney General does have legal control, for purposes of

discovery, over the listed Oregon agencies. While the Oregon Attorney General is a separate entity and while the Oregon Attorney General is acting pursuant to her statutory authority in bringing this action, this does not outweigh the requirement that the Oregon Attorney General will act as the agencies' counsel. The Oregon Attorney General's powers provide "full control" for rendering legal services for Oregon agencies. The Oregon Attorney General does not indicate any sort of limitation to such legal power conferred upon the office. Moreover, the fact that Oregon agencies are proscriptively barred from obtaining counsel other than the Oregon Attorney General (other than in situations involving a conflict) further reinforces the finding of control over the documents necessary for effective legal representation. Therefore, the Court concludes that the Oregon Attorney General has legal control, for the purposes of discovery, over the documents held by the Oregon agencies listed by Meta.

The statutory scheme in Oregon requires that the Oregon Attorney General have "[g]eneral control and supervision of all civil actions and legal proceedings in which the State of Oregon may be a party or may be interested[,]" and have "*[f]ull charge and control of all the legal business* of all departments, commissions and bureaus of the state, or of any office thereof, which requires the services of an attorney or counsel in order to protect the interests of the state." Or. Rev. Stat. § 180.220 (emphasis added). Indeed, the Oregon Attorney General confirmed that its office will definitely represent all of the Oregon agencies at issue if Meta were to serve those agencies with a subpoena in this matter. [Dkt. 738-1 at 24]. Importantly, the Oregon Attorney General's arguments do not negate the fact that all of the Oregon agencies at issue here are barred by Oregon law from obtaining counsel other than the Oregon Attorney General: "No state officer, board, commission, or the head of a department or institution of the state shall employ or be represented *by any other counsel* or attorney at law." Or. Rev. Stat. § 180.220 (emphasis added). This statutory arrangement indicates strongly that the Oregon Legislature expressed its preference that the Oregon Attorney General, in fulfilling its statutory role for the state agencies, would exercise such "full control" over legal representation of agencies, which necessarily and inherently includes having access to and control over the necessary documents for effective legal representation of these state agencies.

Further, there is no statutory, legal, or administrative rule cited which prohibits the Oregon

1 Attorney General from accessing the documents of the state agencies at issue. The Oregon Attorney
2 General argues that “[t]here is no statute or case law that grants the Attorney General authority to
3 compel another state agency to provide documents in a proceeding for which that agency is not a
4 party.” [Dkt. 738-28 at 2]. However, the absence of an express statute granting access, by itself,
5 does not amount to a legal prohibition for the Oregon Attorney General to access documents as part
6 of its representation of the state agencies in this matter for purposes of discovery. Indeed, the
7 plenary statutory phrasing that this Attorney General will have both “general control and
8 supervision” over civil actions and “full charge and control” over “all the legal business” of the
9 agencies can reasonably be interpreted to include access to the documents of these agencies when
10 they are clients being represented or defended in a civil action.

11 The Court recognizes that this is a somewhat unusual situation, in which a law enforcement
12 organization (the attorney general) is both a party to the case while also acting or able to act as
13 counsel for a third party. However, this would not be the first time that a legal services provider, as
14 counsel for a party, is found to have control over third party documents for purposes of discovery.
15 *See, e.g., Becnel*, 2018 WL 691649, at *4 (“Both Salas individually and his law firm, the subpoena
16 recipients and defendants in this court, are counsel of record for the Salas defendants in the Florida
17 lawsuit Thus, a Rule 34 request for production to Salas in the Florida lawsuit required Salas
18 to respond as to responsive materials over which Salas and his law firm had possession, custody or
19 control.”). Indeed, one court has noted that “[i]n general, an attorney is presumed to have control
20 over documents in its client’s possession.” *Perez*, 2014 WL 1796661, at *2. The Court is not
21 holding broadly that there must be a finding of a legal right of access to and thus control over third
22 party client documents in every case involving a legal services provider as a party; rather, under the
23 particular facts here, and under the totality of circumstances viewed in light of applicable legal
24 standards, the Court finds that control exists here.

25 There is no citation to any statutory or legal prohibition on the Oregon Attorney General’s
26 representing the state agencies in this matter for purposes of discovery. The Court recognizes that
27 this is a somewhat unusual situation, in which a law enforcement organization, the attorney general,
28 is both a party to the case while also acting as counsel for a third party. However, this would not be

1 the first time that a legal services provider, as counsel for a party, is found to have control over third
2 party documents for purposes of discovery. *See, e.g., Becnel*, 2018 WL 691649, at *4 (“Both Salas
3 individually and his law firm, the subpoena recipients and defendants in this court, are counsel of
4 record for the Salas defendants in the Florida lawsuit Thus, a Rule 34 request for production
5 to Salas in the Florida lawsuit required Salas to respond as to responsive materials over which Salas
6 and his law firm had possession, custody or control.”). Indeed, one court has noted that “[i]n general,
7 an attorney is presumed to have control over documents in its client’s possession.” *Perez*, 2014 WL
8 1796661, at *2. The Court is not holding broadly that there must be a finding of a legal right of
9 access to and thus control over third party client documents in every case involving a legal services
10 provider as a party; rather, under the particular facts here, and under the totality of circumstances
11 viewed in light of applicable legal standards, the Court finds that control exists here.

12 Relatedly, the Oregon Attorney General has taken the position that communications between
13 the Oregon Attorney General and these state agencies “may include confidential communications
14 protected by the attorney-client or common interest privileges.” Dkt. 738-28 at 2 (“The Attorney
15 General would assert privilege for confidential communications between the Attorney General and
16 any of the identified agencies if the responsive document contained privileged communications.”).
17 To the extent the Oregon Attorney General has attempted to preserve the ability to assert that the
18 privilege applies to communications between the Oregon Attorney General’s Office and these
19 agencies (by using conditional phrasing such as “may”, such attempts support a finding of an
20 attorney-client relationship and thus the kind of access that supports a finding of control for purposes
21 of discovery. *Perez*, 2014 WL 1796661, at *2 Assertion of the attorney-client privilege requires,
22 as a prerequisite, the existence of an attorney-client relationship. *See Graf*, 610 F.3d at 1156.

23 The Oregon Attorney General’s role as counsel for the agencies at issue inherently involves
24 obtaining necessary documents for effective representation in litigation. In acting as counsel, the
25 Oregon Attorney General would necessarily have access to and thus control over the relevant
26 documents needed to respond to discovery requests. *See Monsanto*, 2023 WL 4083934, at *5–6
27 (finding state Attorney General has control over agency documents “based on his broad statutory
28 and common law powers to control and manage legal affairs on behalf of state agencies, has a legal

1 right to obtain responsive documents from the state agencies referenced in the Complaint”).

2 Further, the Oregon Attorney General argues that the Oregon Attorney General is a separate
3 and distinct elected entity with separate duties and responsibilities. [Dkt. 738-28 at 2]. However,
4 this argument misapprehends the “legal control” test for documents – the issue is not simply whether
5 one entity is under the day-to-day operational control of the other (such as a parent-wholly-owned-
6 subsidiary relationship), and not simply whether the two entities are legally separate (such as two
7 different and separately incorporated entities), but rather whether there is a legal right to obtain the
8 documents as explained by *Citric Acid*. While operational control may be a factual situation which
9 demonstrates a legal right to obtain the documents, the absence of such “executive or functional
10 control” is not determinative for evaluating “control” for purposes of discovery. By definition, the
11 “legal control” issue for discovery arises when there are two legally distinct or separate entities –
12 otherwise, if only one entity were involved, there would be no dispute that party discovery covered
13 that one entity. Thus, arguing that the Oregon “Attorney General made the decision to pursue this
14 action as a matter of policy, independently of the Governor and other agencies,” dkt. 738-28 at 2, is
15 simply re-stating the issue to be decided, and not determinative of the issue. The Oregon Attorney
16 General’s arguments erroneously conflate the legal control issue with “operational control” or
17 “functional independence” of each entity, and thus is insufficient to rebut a finding of legal control
18 of the documents for purposes of discovery.

19 “The control analysis for Rule 34 purposes does not require the party to have actual
20 managerial power over the foreign corporation, but rather that there be close coordination between
21 them.”” *St. Jude Medical S.C., Inc.*, 305 F.R.D. at 638. Here, the attorney-client relationship
22 between the Oregon Attorney General and the state agencies (a relationship mandated by state law)
23 necessitates close coordination. Therefore, the Court concludes that the Oregon Attorney General
24 has legal control, for the purposes of discovery, over the documents held by the Oregon agencies
25 listed by Meta, including in particular the three agencies recently listed in the intent to issue
26 subpoenas.

27 Indeed, at least one other federal court has previously found that the Oregon Attorney
28 General has legal control over Oregon state agency materials. *Generic Pharmaceuticals (II)*, 699

1 F. Supp. 3d at 357–58. While this Court reaches its own independent conclusions consistent with
2 the applicable legal standards discussed above and in light of the facts and circumstances presented
3 here, the analysis in the *Generic Pharmaceuticals (II)* Multi-District Litigation is certainly
4 consistent with, and to that extent further persuasively supports, the conclusion here with regard to
5 the Oregon Attorney General’s having control with regard to documents of the state agencies at
6 issue. Given that the *Generic Pharmaceuticals (II)* opinion resolved the control issue against all the
7 objecting states including Oregon, this Court is disappointed that the Oregon Attorney General and
8 Meta were unable to reach a negotiated resolution of this dispute, which other states were able to do
9 in *Generic Pharmaceuticals (II)*. As the Court has repeatedly encouraged the Parties at multiple
10 Discovery Management Conferences, they should make every effort to work out discovery disputes
11 through reasonable, good faith negotiations between able and experienced counsel, particularly
12 where, as here, there is guidance in precedent on the discovery issue at hand.

13 **XXVIII. PENNSYLVANIA**

14 In opposition to the control issue, the Pennsylvania Attorney General argues primarily the
15 following factors: (1) the Pennsylvania Attorney General is a separate entity and independent from
16 the Pennsylvania agencies; (2) the Pennsylvania Attorney General can only access Pennsylvania
17 agency documents when the Pennsylvania Attorney General is utilizing its investigatory powers;
18 (3) the Pennsylvania Attorney General’s instant law suit is premised on harm done to Pennsylvania
19 consumers and not the state; (4) the Pennsylvania Attorney General does not seek relief on behalf
20 of the Pennsylvania agencies. [Dkt. 738-29 at 2].

21 In support of a finding of control with regard to these state agencies’ documents, Meta argues
22 based primarily on the following factors: (1) the Pennsylvania Attorney General must act as counsel
23 for the Pennsylvania agencies; and (2) Pennsylvania law allows the Pennsylvania Attorney General
24 to access Pennsylvania agency documents whenever necessary to carry out its functions. *Id.* at 3.
25 Here, Meta seeks discovery from the following agencies: Business Oregon, the Office of the
26 Governor, Department of Administrative Services, Department of Consumer and Business Services,
27 and Department of Education. *Id.*

28 After considering the factors argued in the briefs, the Court finds that the factors weigh in

1 favor of a finding that the Pennsylvania Attorney General does have legal control, for purposes of
2 discovery, over the listed Pennsylvania agencies. While the Pennsylvania Attorney General asserts
3 that Pennsylvania agencies are independent, these arguments do not negate the fact that the Attorney
4 General is the chief legal advisor for the state government. Further, as discussed below, the
5 argument that the Pennsylvania Attorney General can only access agency documents for
6 investigations is not persuasive.

7 Here, unlike in several other states, the Court finds that there is an express right for the
8 Pennsylvania Attorney General to access state agencies' documents. For purposes of establishing
9 "legal control" over documents, "[d]ecisions from within this circuit have noted the importance of
10 a legal right to access documents created by *statute*, affiliation or employment." *In re Legato Sys.,*
11 *Inc. Sec. Litig.*, 204 F.R.D. at 170 (emphasis added) (finding "legal control" and ordering party to
12 obtain and produce transcript not within current possession where federal regulation, 17 C.F.R. §
13 203.6, grants legal right to ask for and obtain transcript of testimony from SEC); *see also In re ATM*
14 *Fee Antitrust Litig.*, 233 F.R.D. at 545 (finding "a bank holding company necessarily controls its
15 subsidiary banks" and thus has "legal control" of documents of bank by virtue of the Bank Holding
16 Company Act, 12 U.S.C. § 1841(a)(1)).

17 Here, there is an express statute granting the Pennsylvania Attorney General a legal right to
18 access the documents and materials of the six state agencies. Under Pennsylvania law, the
19 Pennsylvania Attorney General has the unfettered right to obtain documents from Pennsylvania state
20 agencies. Specifically, Pennsylvania law provides that "[t]he office of Attorney General ***shall have***
21 ***the right to access at all times to the books and papers of any Commonwealth agency*** necessary
22 to carry out its duties under this act." 71 Pa. Stat. § 732-208 (emphasis added).

23 In opposing the arguments in favor of control, the Pennsylvania Attorney General argues
24 that they have no legal right or ability to obtain documents from the state agencies, and that the state
25 agencies could simply refuse to hand over documents to the Attorney General in response to the
26 document requests. Despite the plain wording of the statute, the Pennsylvania Attorney General
27 argues that this statute is limited only to situations in which the Pennsylvania Attorney General is
28 investigating a particular state agency. [Dkt. 738-29 at 2]. That assertion is wrong as a matter of

law. First, there is no such express limitation in the text of the statute. The plain text of a statute controls its interpretation. *In re Path Network, Inc.*, 703 F. Supp. 3d 1046, 1068 (N.D. Cal. 2023) (citing *In re Zynga Priv. Litig.*, 750 F.3d 1098, 1105 (9th Cir. 2014); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988)). Second, the Pennsylvania Attorney General cites nothing in the surrounding text of the statutory scheme of the Act to indicate that the Pennsylvania legislature implicitly intended to limit the scope of the Pennsylvania Attorney General’s right to access agency papers only to direct investigations of those agencies by the state Attorneys General. *Smith v. Spizzirri*, 601 U.S. 472, 472 (2024) (rejecting party’s argument to interpret Section 3 of the Federal Arbitration Act because “respondents’ attempt to read ‘stay’ to include ‘dismiss’ cannot be squared with the surrounding statutory text”); *K Mart Corp.*, 486 U.S. at 291 (implicit limitations should not be read into a statute absent clear guidance from the rest of the Act or other compelling guidance from the legislature).

Further, the Pennsylvania Attorney General made exactly this same argument in another Multi-District Litigation involving a similar discovery dispute, and that court rejected this very same argument:

Pennsylvania also argues that the [Special Discovery Master’s Report and Recommendation] R&R incorrectly determined that the OAG [Office of Attorney General] had control over the state agency documents sought by Defendants because the OAG only has such power when it is either investigating potentially unlawful behavior by Commonwealth agencies or litigating claims on behalf of Commonwealth agencies. Neither is being done here. Pennsylvania argues that the Amended Fourth R&R effectively seeks to usurp the OAG’s investigative authority, and would have the result of making each Commonwealth agency a party subject to Rule 26 discovery in every litigation brought by or against the OAG. If Defendants want the documents, Pennsylvania argues, they must serve them on the agencies as part of third-party discovery, and Pennsylvania represents that the OAG has offered to facilitate that discovery process Pennsylvania statutes address the relationship between the Office of the Attorney General and Commonwealth agencies with regard to the right to obtain documents. The key Pennsylvania statute, Section 208 of the Commonwealth Attorneys Act, provides in full that “[t]he Office of Attorney General shall have the right to access at all times to the books and papers of any Commonwealth agency necessary to carry out his duties under this act.” The Pennsylvania Supreme Court has held that Section 208:

“lists only one condition on the mandate of production: the material sought must be ‘necessary’ for execution of the OAG’s duties. We

1 recognize that the OAG has a broad array of duties involving
2 Commonwealth agencies beyond criminal investigations, and that the
[statute] is of correspondingly broad scope. Nevertheless the
authorization remains qualified only by what is ‘necessary.’”

3 Although the Pennsylvania Supreme Court was ruling in the context
4 of a grand jury investigation of a Commonwealth agency, the Court
expressly affirmed that the statute is a broad one that extends beyond
5 criminal investigations, qualified only by what is “necessary.”
6 Because Pennsylvania has put into this suit the relevance of
documents from the agencies that paid for generic drugs, it is
7 necessary to its duties in complying with the Federal Rules of Civil
Procedure in the litigation of the MDL, and the OAG therefore has
access to the documents under Pennsylvania law.

8 *Generic Pharmaceuticals (I)*, 571 F. Supp. 3d at 410–11 (quoting *In re Thirty-Third Statewide*
9 *Investigating Grand Jury*, 86 A.3d 204, 216 (Pa. 2014)).

10 Here, the Pennsylvania Attorney General filed suit against Meta and the prosecution of this
11 matter is, by definition, one of the Attorney General’s duties. Responding to discovery is a
12 necessary part of litigating this case, which the Pennsylvania Attorney General chose to initiate.
13 Obtaining documents in order to respond to discovery requests is necessary to accomplish the
14 Attorney General’s duties in this case. Meta asserts that the documents sought from these agencies
15 are relevant to (or at the very least, within the scope of discovery for) the issues disputed in this
16 Multi-District Litigation, and the state Attorney General’s make no argument that the documents
17 are irrelevant to the case.

18 The fact that the Pennsylvania Attorney General is not seeking civil penalties, but is instead
19 asserting harm to Pennsylvania consumers, is not dispositive of whether the documents are
20 necessary for the Pennsylvania Attorney General to carry out its duties. [Dkt. 738-29 at 2]. To the
21 extent the Pennsylvania agencies have relevant, responsive documents concerning the alleged harms
22 to Pennsylvania consumers, the Pennsylvania Attorney General has by definition put those issues
23 and documents relevant to such issues into this suit. And here, as in the *Generic Pharmaceuticals*
24 *(I)* Multi-District Litigation, these agency documents are necessary for the Pennsylvania Attorney
25 General’s duties in complying with the Federal Rules of Civil Procedure in this Multi-District
26 Litigation. 71 Pa. Stat. § 732-208 (“[t]he office of Attorney General shall have the right to access
27 at all times to the books and papers of *any Commonwealth agency necessary to carry out its duties*
28 *under this act.*”) (emphasis added).

Further, Pennsylvania law mandates that the Pennsylvania “Attorney General *shall represent* the Commonwealth and *all Commonwealth agencies*.” 71 Pa. Stat. § 732-204 (emphasis added). Under Pennsylvania law, the Pennsylvania Attorney General’s office will necessarily represent these state agencies in responding to Meta’s discovery in this matter (regardless of whether the discovery is pursued procedurally under Rule 34 or under Rule 45), and thus the Pennsylvania Attorney General has an express statutory right under Pennsylvania law to obtain documents from these state agencies upon demand. The Court finds that searching for and producing relevant, non-privileged documents from the state agencies is necessary for the Pennsylvania Attorney General to carry out its duties in this Multi-District Litigation. *See id.* Even absent the express statutory right to obtain documents, the mandatory attorney-client relationship is sufficient to establish that the Pennsylvania Attorney General has legal control over the state agencies’ documents here.

Relatedly, the Pennsylvania Attorney General has taken the position that, “should” the Pennsylvania Attorney General be retained by the state agencies with regard to responding to any subpoenas, communications between the Pennsylvania Attorney General and these state agencies would be covered by the attorney-client privilege. [Dkt. 738-9 at 2]. In order to minimize this assertion of privilege, the Pennsylvania Attorney General has attempted to subdivide its own office between the team litigating this case and “different attorneys than those involved in this enforcement action” in order to argue conclusively that the assertion of attorney-client privilege “would not change the possession, custody, or control analysis” without citation to any legal support. *Id.* The Court finds this argument is not supported by citation to law and is contrary to the weight of law. The scope of attorney-client relationship (and the duties flowing therefrom, including the scope of the attendant attorney-client privilege) encompasses the entirety of a legal services organization due to well-known rules of imputation of confidences to a legal services organization, including a public law office. *See, e.g., People ex rel. Peters*, 951 P.2d at 930 (“When an attorney associates with a law firm, the principle of loyalty to the client extends beyond the individual attorney and applies with equal force to the other attorneys practicing in the firm. This principle, known as the ‘rule of imputed disqualification,’ . . . requires disqualification of all members of a law firm when any one of them practicing alone would be disqualified because of a conflict of interest The rule of

1 imputed disqualification applies to both private firms and public law firms such as a district
2 attorney's office or the office of the state public defender."); accord *City of Cnty. of Denver*, 37 P.3d
3 at 457; see also *Kirk*, 108 Cal. Rptr. 3d at 637–38, 642 ("We do not doubt that vicarious
4 disqualification is the general rule, and that we should presume knowledge is imputed to all
5 members of a tainted attorney's law firm. However, we conclude that, in proper circumstances, the
6 presumption is a rebuttable one[.]” The court recognizing presumption of imputed knowledge in
7 the context of government attorneys, which presumption could be rebutted by proper ethical
8 screening); cf. also *Billings*, 441 S.E.2d at 266 (because individual government lawyer at issue
9 “should be screened from any direct or indirect participation in the matter,” vicarious
10 disqualification of entire office denied); cf. also *Calhoun*, 492 S.W.3d at 137 (individual lawyer
11 disqualified when joining prosecutors’ office but “the entire office in which that attorney works is
12 not disqualified as long as the disqualified attorney is appropriately screened. Disqualification of
13 the entire prosecuting office is not necessary absent special facts, such as a showing of actual
14 prejudice; or, perhaps the screening procedures are ineffective.”). Some jurisdictions treat public
15 legal service organizations like private law firms and impute shared confidences among lawyers of
16 the entire public law entity. Even in jurisdictions which do not automatically impute
17 disqualification, and shared confidences, to an entire public law office, those courts recognize that
18 ethical screening or other procedures are required out of recognition that actual (as opposed to
19 imputed) sharing of confidences may occur and such procedures are required to avoid dissemination
20 of attorney-client privileged communications within an entire public law organization. This review
21 of case law demonstrates that no courts support Pennsylvania’s argument that different individual
22 lawyers in the Pennsylvania Attorney General’s office have *ex ante* separable, discrete attorney-
23 client relationships.

24 The Court rejects Pennsylvania’s attempt to simultaneously disclaim the existence of an
25 attorney-client privilege as between the attorneys “involved in this enforcement action” while
26 apparently attempting to preserve the ability to assert the privilege applies to communications
27 between other lawyers in the Attorney General’s office and these agencies. “[T]o the extent that
28 [the State] asserts an attorney-client privilege with these legislators, it does so solely in their official

1 capacities [I]t is inconsistent for the State to argue that on one hand the [State] Attorney
2 General represents these individuals, but that for discovery purposes the [Plaintiff] United States
3 must resort to Federal Rule of Civil Procedure 45.” *Perez*, 2014 WL 1796661, at *2. The fact that
4 the Pennsylvania Attorney General is attempting to preserve the ability to assert the attorney-client
5 privilege between the Pennsylvania Attorney General’s office and the agencies at issue further
6 supports the conclusion of control here. Assertion of the attorney client privilege requires, as a
7 prerequisite, the existence of an attorney-client relationship. *See Graf*, 610 F.3d at 1156.

8 Indeed, the Pennsylvania Attorney General confirmed that its office could represent all of
9 the Pennsylvania agencies at issue, if Meta were to serve those agencies with a subpoena in this
10 matter. [Dkt. 738-1 at 25]. Accordingly, it appears that under the statutory scheme each agency
11 will be represented by the Pennsylvania Attorney General in this matter for discovery. 71 Pa. Stat.
12 § 732-204. Thus, as a matter of the efficient and rational administration of justice in this case,
13 because the Pennsylvania Attorney General will be involved in representing these state agencies in
14 any event in this case (whether to respond to subpoenas or to respond to party discovery), the Court
15 in its discretion determines that a finding of control is further supported by the simple and pragmatic
16 realities involved in these circumstances.

17 At oral argument, the Pennsylvania Attorney General (along with other states) raised the
18 same “virtual veto” argument raised by other states. As discussed, this argument is based on an
19 unsupported hypothetical possibility that the state agencies could simply refuse to cooperate with
20 their statutorily-mandated lawyers (the Pennsylvania Attorney General’s office) and refuse to
21 provide documents in response to the document requests. From that, the Pennsylvania Attorney
22 General (consistent with other states) argues that the Attorney General’s office would have no
23 mechanism or recourse if the agencies simply refused, and that this would put the Attorney
24 General’s office in the untenable position of potentially being sanctioned for failure to obtain
25 documents from the state agencies. *Id.* This is a variation on the “virtual veto” argument, discussed
26 above, which the Court finds unpersuasive to rebut the finding of control.

27 First, the Pennsylvania Attorney General presented no evidence to support this hypothetical
28 risk that the Pennsylvania state agencies would simply refuse to provide documents, and presented

1 no evidence that these agencies have ever refused to cooperate in discovery in the past. Indeed, this
2 hypothetical refusal by state agencies is a particularly weak argument in light of Pennsylvania’s
3 statutory scheme which gives the Pennsylvania Attorney General the express right to obtain agency
4 documents. Second, this hypothetical raised by the Pennsylvania Attorney General (and other
5 states) is not merely an unfounded “fear”, this argument assumes that the state agencies would act
6 unreasonably in defiance of a discovery Order such as the instant Order. It is not reasonable to base
7 a legal conclusion on an unreasonable, unsupported hypothetical that imagines the worst possible
8 behavior; rather, the law presumes that parties will act reasonably and rationally in response to court
9 Orders. “We think that surely one must assume that litigants will obey court orders. Once we assume
10 otherwise, then our system of jurisprudence is in serious trouble.” *E. I. du Pont de Nemours & Co.*,
11 442 F. Supp. at 825; *see also Casas*, 2017 WL 1153336, at *6 (The Court recognized the existence
12 of “the legal presumption that defendants had regularly discharged their duties and complied with
13 the court’s order.”).

14 Third and perhaps most importantly, if the state agencies simply refused to comply, they
15 would be subject to legal consequences. A Court has the inherent authority to enforce its own Orders
16 in order to control the conduct of the proceedings, protect the “orderly administration of justice,”
17 and to maintain “the authority and dignity of the court.” *Roadway Express, Inc.*, 447 U.S. at 764–
18 67 (citations omitted). Because (as discussed herein) the Court finds that the Pennsylvania Attorney
19 General’s office has legal control of documents from the Pennsylvania state agencies (and thus
20 discovery from the state agencies under Rule 34 is appropriate), then the state agencies would be in
21 direct violation of this very Order if they should hypothetically choose to completely defy this very
22 Order and refuse to provide documents to the Pennsylvania Attorney General. Meta could, in that
23 situation, file a motion to compel and, should the state agencies continue to simply refuse to provide
24 documents, this Court would have the inherent authority to issue sanctions (including monetary
25 sanctions) against the state agencies for any such hypothetical refusal to abide by an Order of this
26 Court. The Pennsylvania Attorney General’s argument that the Court would choose to sanction
27 their office in this situation presumes this Court would act in ignorance of the source of the non-
28 compliance – if, as hypothetically theorized, it were the state agencies who were non-compliant

1 despite the best efforts of the state Attorney General to secure compliance, the Court is perspicacious
2 enough to understand that the fault would lie with the hypothetical state agency and not the
3 Pennsylvania Attorney General, and in the event some enforcement mechanism were needed (such
4 as the hypothetically feared sanctions), the Court would presumably have the wisdom to understand
5 how and where to focus any such enforcement Order. *Qualcomm*, 2010 WL 1336937, at *2–5;
6 *Optronix Techs., Inc.*, 2020 WL 2838806 at *5–7.

7 Therefore, unlike the factors in *Citric Acid*, the state agencies here would not be in a position
8 to obstinately refuse to provide documents in response to the document requests without incurring
9 risk of legal consequences. Unlike in *Citric Acid*, the party here which is alleged to (and found to)
10 have control (the state Attorney General) does in fact have legal recourse to secure the compliance
11 of the controlled entities (the state agencies) should they simply refuse to turn over the documents.
12 This bolsters the Court’s finding that the state Attorney General here does possess the “legal ability”
13 to obtain the documents from the state agencies, over and in addition to the statutory basis discussed
14 above. *Cf. Citric Acid*, 191 F.3d at 1107 (lack of “legal ability” to obtain documents is a factor in
15 finding no “legal control”). The fact that legal recourse is available in this event is therefore a factor
16 which, according to *Citric Acid*, demonstrates that legal control exists in the factual circumstances
17 here.

18 As discussed above, the Court is not persuaded by the argument that the Pennsylvania
19 Attorney General lacks control over state agency documents, because an attorney in a court
20 proceeding can simply do nothing when faced with a client who (hypothetically here) refuses to
21 collect or provide documents for production in discovery. As counsel for a party subject to
22 discovery, the Pennsylvania Attorney General has the legal authority and duty to take action to make
23 inquiry and collect the documents from the uncooperative state agencies directly, and cannot simply
24 sit on their hands in the face of an uncooperative client – this is would not be the first time an
25 attorney was faced with a client who was difficult to deal with in collecting documents for discovery.
26 *See, e.g., Qualcomm*, 2010 WL 1336937, at *2–5. Counsel in a litigation has legal duties to take
27 pro-active steps in supervising and searching for documents in discovery that go far beyond simply
28 acceding to a client who fails to (or worse, refuses to) produce or provide documents. *Id.* (detailing

“Discovery Errors” by counsel); *Rodman*, 2016 WL 5791210, at *3–4. Counsel cannot simply advise clients about document requests and leave it up to the client to decide whether or not to risk sanctions for failure to produce – in appropriate circumstances, counsel may need to personally conduct or directly supervise a client’s collection, review, and production of responsive documents. *Optronic Techs., Inc.*, 2020 WL 2838806 at *5–7 (“The Court does not conclude that counsel must always personally conduct or directly supervise a client’s collection, review, and production of responsive documents. However, in the circumstances presented here, the Court finds that [counsel] Sheppard Mullin did not make a reasonable effort [T]he Court orders Ningbo Sunny’s new counsel of record to undertake an independent effort to ensure that Ningbo Sunny fully complies with Orion’s post-judgment document requests.”). The Court rejects as legally erroneous the Pennsylvania Attorney General’s arguments, because they are based on a misunderstanding of counsel’s role (and duties) in discovery and the available procedures under the Federal Rules for the proper conduct of discovery and the rational administration of justice. *See King*, Case No. 20-cv-04322-LGS-OTW, Dkt. 272, slip op. at 2 (“embroil[ing the judge] in day-to-day supervision of discovery [is] a result directly contrary to the overall scheme of the federal discovery rules.”).

In addition to their duties to supervise the collection of documents and make inquiry of clients to ensure proper collection of documents is undertaken, attorneys representing clients in court proceedings have legal duties under the Federal Rules of Civil Procedure to work cooperatively to improve the administration of civil justice, both as officers of the Court and under their ethical obligations as members of the bar of this Court. *See* Fed. R. Civ. P. 1 advisory committee’s note to 2015 amendment. “Rule 26(g) imposes ***an affirmative duty to engage in pretrial discovery in a responsible manner*** that is consistent with the spirit and purposes of Rules 26 through 37 The subdivision provides a deterrent to both excessive discovery and evasion by imposing a certification requirement that ***obliges each attorney*** to stop and think about the legitimacy of a discovery request, ***a response thereto, or an objection*** If primary responsibility for conducting discovery is to continue to rest with the litigants, they must be obliged to act responsibly and avoid abuse.” *See* Fed. R. Civ. P. 26 advisory committee’s note to 1983 amendment.

As the Ninth Circuit has recognized, “legal duties” are jural correlatives and logically

1 antecedent to “legal rights” – and thus the Pennsylvania Attorney General’s legal duties to undertake
2 proactive efforts to collect documents from clients in discovery are the flip side to the legal right to
3 access those documents. *Newman*, 287 F.3d at 790 n.5 (“The logical relationship between rights
4 and duties has been the subject of considerable academic examination. Wesley Hohfeld famously
5 described rights and duties as ‘jural correlatives’—different aspects of the same legal relation.
6 Oliver Wendell Holmes described rights as ‘intellectual constructs used to describe the
7 consequences of legal obligations. [sic] As he puts it [in *The Common Law* (1881)], ‘legal duties
8 are logically antecedent to legal rights.’”) (internal citations omitted). Here, the recognition that a
9 state Attorney General, acting as counsel for the state agencies here, has legal duties to supervise
10 the collection of (and possibly directly obtain) documents from those agencies for discovery lends
11 further support to the conclusion that the state Attorney General has the legal right to access those
12 documents. That is, counsel’s legal duty to ensure collection of documents from a client is a
13 different aspect of (and correlates juridically to) a legal right to access those documents, and thus
14 supports the conclusion of control for purposes of discovery.

15 The Pennsylvania Attorney General’s role as counsel for the agencies at issue inherently
16 involves obtaining necessary documents for effective representation in litigation. In acting as
17 counsel, the Pennsylvania Attorney General would necessarily have access to and thus control over
18 the relevant documents needed to respond to discovery requests. *See Monsanto*, 2023 WL 4083934,
19 at *5–6 (finding state Attorney General has control over agency documents “based on his broad
20 statutory and common law powers to control and manage legal affairs on behalf of state agencies,
21 has a legal right to obtain responsive documents from the state agencies referenced in the
22 Complaint”). To the extent the Pennsylvania Attorney General argues that these agencies are
23 “separate entities under law” from the state Attorney General and are not supervised by the state
24 Attorney General, *see* Dkt. 738-29 at 2, that argument misapprehends the “legal control” test for
25 documents – the issue is not simply whether one entity is under the day-to-day operational control
26 of the other (such as a parent-wholly-owned-subsidiary relationship), and not simply whether the
27 two entities are legally separate (such as two different and separately incorporated entities), but
28 rather whether there is a legal right to obtain the documents as explained by *Citric Acid*. “‘The

control analysis for Rule 34 purposes does not require the party to have actual managerial power over the foreign corporation, but rather that there be close coordination between them.” *St. Jude Medical S.C., Inc.*, 305 F.R.D. at 638. Here, the attorney-client relationship between the state Attorney General and the state agencies (a relationship mandated by state law) necessitates close coordination. While operational control may be a factual situation which demonstrates a legal right to obtain the documents, the absence of such “executive or functional control” is not determinative for evaluating “control” for purposes of discovery. By definition, the “legal control” issue for discovery arises when there are two legally distinct or separate entities – otherwise, if only one entity were involved, there would be no dispute that party discovery covered that one entity. As discussed above, courts have found “control” for purposes of discovery where a party is clearly not in managerial control over the third-party, such as a subsidiary having control over the documents of a parent corporation, or an individual government officer having control over the documents of an entire agency. Thus, arguing that the Pennsylvania Attorney General “neither governs nor is governed by another Commonwealth agency” is simply re-stating the issue, *id.* (citation omitted), and not determinative of the issue. Arguing that the Pennsylvania Attorney General is “an independent agency”, *id.*, confuses and conflates the “legal control” issue for discovery with “operational control” or “functional independence” and thus constitutes a legally erroneous argument.

Meta has argued that state agencies are part of the government of the Commonwealth of Pennsylvania (the Plaintiff) and thus should be treated as parties for purposes of discovery based on that status. [Dkt. 685 at 6 n.4]. Semantically this position may have some facial appeal at a broad level. *See In re Redf Mktg., LLC*, No. 12-32462, 2015 WL 1137661, at *3 (Bankr. W.D.N.C. Mar. 10, 2015) (“state agencies are, as the term suggests, agents of the state.”). If the Pennsylvania state agencies are agents of the state, then under *Hitachi*, that factor would militate in favor of finding “legal control.” *Hitachi*, 2006 WL 2038248, at *1. However, determining whether a particular state agency is an agent of its sovereign state appears to involve a multi-factor analysis. *See Savage v. Glendale Union High School Dist. No. 205, Maricopa County*, 343 F.3d 1036, 1040–41 (9th Cir. 2003) (“To determine whether a governmental entity is an arm of the state for Eleventh Amendment

1 purposes, we examine the following factors: (1) whether a money judgment would be satisfied out
2 of state funds; (2) whether the entity performs central governmental functions; (3) whether the entity
3 may sue or be sued; (4) whether the entity has the power to take property in its own name or only
4 in the name of the state; and (5) the corporate status of the entity.”). Here, Meta has not cited law
5 to establish whether “agency” for purposes of discovery is evaluated under the same legal standard
6 as “agency” for purposes of sovereign immunity, and further Meta has provided only cursory
7 argument to support a finding that each of the six Pennsylvania state agencies should be held to be
8 agents of the Commonwealth of Pennsylvania for purposes of discovery under applicable legal
9 standards. Accordingly, while the Court notes this factor, it is non-dispositive on the record
10 presented to the Court.

11 The Pennsylvania Attorney General has cited no statutory, legal, or administrative rule cited
12 which prohibits the Pennsylvania Attorney General from accessing the documents of the state
13 agencies at issue, and as discussed above, there is an express statute granting that access. Nor is
14 there citation to any statutory or legal prohibition on the Pennsylvania Attorney General’s
15 representing the state agencies in this matter for purposes of discovery. The Court recognizes that
16 this is a somewhat unusual situation, in which a law enforcement organization (the Attorney
17 General) is both counsel to a party to the case while also acting or able to act as counsel for a third
18 party. However, this would not be the first time that a legal services provider, as counsel for a party,
19 is found to have control over third party documents for purposes of discovery. *See, e.g., Becnel*,
20 2018 WL 691649, at *4 (“Both Salas individually and his law firm, the subpoena recipients and
21 defendants in this court, are counsel of record for the Salas defendants in the Florida lawsuit
22 Thus, a Rule 34 request for production to Salas in the Florida lawsuit required Salas to respond as
23 to responsive materials over which Salas and his law firm had possession, custody or control.”).
24 Indeed, one court has noted that “[i]n general, an attorney is presumed to have control over
25 documents in its client’s possession.” *Perez*, 2014 WL 1796661, at *2. The Court is not holding
26 broadly that there must be a finding of a legal right of access to and thus control over third party
27 client documents in every case involving a legal services provider as a party or counsel to a party;
28 rather under the particular facts here and under the totality of circumstances viewed in light of

1 applicable legal standards, the Court finds that control exists here.

2 Indeed, at least one other federal court has previously found that the Pennsylvania Attorney
3 General has legal control over Pennsylvania state agency materials. *Generic Pharmaceuticals (I)*,
4 571 F. Supp. 3d at 408; *see also* 2023 WL 6985587, at *3 (E.D. Pa. Oct. 20, 2023). While this Court
5 reaches its own independent conclusions consistent with the applicable legal standards discussed
6 herein in light of the facts and circumstances presented here, the analysis in both opinions from the
7 Pennsylvania federal district court in the *Generic Pharmaceuticals (I)* and *Generic Pharmaceuticals*
8 *(II)* Multi-District Litigations are certainly consistent with (and to that extent further persuasively
9 supports) the conclusion here with regard to the Pennsylvania Attorney General's having control
10 with regard to documents of the state agencies at issue. Given that the *Generic Pharmaceuticals (I)*
11 Court resolved the control issue against all the objecting states including Pennsylvania, this Court
12 is disappointed that the Pennsylvania Attorney General and Meta were unable to reach a negotiated
13 resolution of this dispute. As the Court has repeatedly encouraged the Parties at multiple Discovery
14 Management Conferences, they should make every effort to work out discovery disputes through
15 reasonable, good faith negotiations between able and experienced counsel, particularly where (as
16 here) there is guidance in precedent on the discovery issue at hand.

17 **XXIX. RHODE ISLAND**

18 In opposition to the control issue, the Rhode Island Attorney General argues primarily the
19 following factors: (1) the Rhode Island Attorney General is a separate entity and independent from
20 the Rhode Island agencies; and (2) the Rhode Island Attorney General only represents Rhode Island
21 agencies if requested by said agency and if the Rhode Island Attorney General consents to act as
22 legal counsel. [Dkt. 738-30 at 2].

23 In support of a finding of control with regard to these state agencies' documents, Meta argues
24 based primarily on the following factors: (1) that the Rhode Island Attorney General is the legal
25 representative of all state agencies, and (2) that no statute deprives the Rhode Island Attorney
26 General from accessing Rhode Island agency documents. *Id.* at 3. Here, Meta seeks discovery from
27 the following agencies: the Board of Governors for Higher Education; Department of
28 Administration; Department of Behavioral Healthcare, Developmental Disabilities and Hospitals;

1 Department of Children, Youth, and Families; Department of Education; Department of Health;
2 Department of Human Services; Executive Office of Health and Human Services; Office of the
3 Governor; and Office of the Child Advocate. *Id.*

4 After considering the factors argued in the briefs, the Court finds that the factors weigh in
5 favor of a finding that the Rhode Island Attorney General does have legal control, for purposes of
6 discovery, over the listed Rhode Island agencies.

7 The statutory scheme in Rhode Island requires that “the attorney general, whenever
8 requested, ***shall act*** as the legal adviser of . . . all state boards, divisions, departments, and
9 commissions . . . and shall institute and prosecute, whenever necessary, all suits and proceedings
10 which they may be authorized to commence, and ***shall appear for*** and defend the . . . boards,
11 divisions, departments, commissions, commissioners, and officers, ***in all suits*** and proceedings
12 which may be brought against them in their official capacity.” 42 R.I. Gen. Laws § 42-9-6 (emphasis
13 added).

14 Indeed, the Rhode Island Attorney General confirmed that its office could represent all the
15 agencies at issue if Meta were to serve those agencies with a subpoena in this matter. [Dkt. 738-1
16 at 25–26]. As discussed above, no separate counsel has entered appearance on behalf of the Rhode
17 Island state agencies. Accordingly, it appears that under the statutory scheme each agency will be
18 represented by the Rhode Island Attorney General in this matter for discovery. *Common Cause*
19 *Rhode Island v. Gorbea*, 970 F.3d 11, 17 (1st Cir. 2020) (the Rhode Island “attorney general . . . by
20 law is obligated to act as legal advisor ***for all state agencies*** and officers acting in their official
21 capacity and to defend them against suit, R.I. Gen. Laws § 42-9-6[.]”) (emphasis added). Certainly,
22 in the face of this statutory scheme, it is not surprising that the Rhode Island Attorney General cites
23 no law which prohibits that office from representing the state agencies in this matter.

24 Further, there is no statutory, legal, or administrative rule cited which prohibits the Rhode
25 Island Attorney General from accessing the documents of the state agencies at issue. The Rhode
26 Island Attorney General argues that the “Rhode Island laws that permit or require sharing of
27 information do so in the context of affirmative investigations, actions, or projects.” Dkt. 738-30 at
28 2 (citations omitted). However, several of these statutes relate to sharing information with agencies

1 or commissions other than the Attorney General and are thus irrelevant to the control issue here.
2 *See, e.g.*, Dkt. 738-30 at 2 (citing R.I. Gen. Laws § 42-119-8 (disclosure to the R.I. Commission on
3 Women and Girls; § 42-26-11 (disclosure to “commission of the Public Safety Grant Administration
4 Office”)). Other cited statutes relate to disclosures from agencies not involved in this action or for
5 statutory purposes unrelated to this Multi-District Litigation, and thus are not instructive on the
6 control issue here. *See, e.g.*, Dkt. 738-30 at 2 (citing R.I. Gen. Laws § 42-45.1-12 (relating to
7 Antiquities Act of R.I.); § 42-66-10 (relating to Office of Healthy Aging, not at issue in this Multi-
8 District Litigation); § 42-66.7-9(b) (relating to long term care ombudsman, not at issue in this Multi-
9 District Litigation)). Further, while these statutes provide for disclosure of information in the
10 context of certain investigations or for identified purposes, none of these statutes state that they are
11 the **only** method by which the Rhode Island Attorney General may obtain documents from state
12 agencies. Indeed, the only cited statute which relates to an agency at issue in this case, *see* dkt. 738-
13 30 at 2 (citing R.I. Gen. Laws § 42-72-8(b)), grants the Rhode Island Attorney General the
14 unrestricted legal rights to access documents and information from the Rhode Island Department of
15 Children, Youth, and Families, in circumstances involving either an investigation of (or prosecution
16 of) criminal conduct by another person relating to a child or other children within the same family
17 unit, or an investigation of (or prosecution of) false reporting of child abuse or neglect. *See* R.I.
18 Gen. Laws §§ 42-72-8(b)(7), -8(b)(9). If the Rhode Island Attorney General were currently
19 investigating any potential criminal charges against Meta relating to children (which is known only
20 to the Rhode Island Attorney General at this time), then the Rhode Island Attorney General would
21 have a legal right to access (and thus control) over the documents of the Rhode Island Department
22 of Children, Youth, and Families. In any event, close reading of these statutes, ultimately,
23 demonstrates that none of them explicitly or implicitly forbid the Rhode Island Attorney General
24 from accessing documents for the purposes of discovery during its scope of legal representation of
25 the state agencies.

26 The Rhode Island Attorney General argues that agencies “routinely require the [Rhode
27 Island Attorney General’s] Office to issue subpoenas in enforcement cases before producing
28 documents to the Office.” [Dkt. 738-30 at 2]. From this, the Rhode Island Attorney General appears

1 to be arguing that the only way to obtain documents from state agencies would be by subpoena here,
2 even if the Rhode Island Attorney General were representing those very same state agencies as
3 clients (and not as the subjects of investigations). An argument that a lawyer representing a Rhode
4 Island state agency (whether the state Attorney General or private counsel) would be forced to issue
5 a subpoena to obtain documents from their own client is nonsensical and impractical, as well as
6 contrary to the principles of effective legal representation. As counsel for a state agency, the Rhode
7 Island Attorney General will have the normal type of direct access to the necessary documents from
8 its own clients, ensuring efficient and comprehensive legal support for the agencies involved. Under
9 the statutory scheme, the Rhode Island Attorney General is regularly called upon to represent the
10 interests of state agencies, which inherently requires a level of access to agency documents
11 necessary to render legal representation effectively. The Rhode Island Attorney General cites no
12 precedent requiring any attorneys representing a Rhode Island state agency to use a subpoena to
13 obtain documents from their own clients. The Rhode Island Attorney General's role as counsel for
14 the agencies at issue inherently involves obtaining necessary documents for effective representation
15 in litigation. In acting as counsel, the Rhode Island Attorney General would necessarily have access
16 to and thus control over the relevant documents needed to respond to discovery requests. *See*
17 *Monsanto*, 2023 WL 4083934, at *5–6 (finding state Attorney General has control over agency
18 documents “based on his broad statutory and common law powers to control and manage legal
19 affairs on behalf of state agencies, has a legal right to obtain responsive documents from the state
20 agencies referenced in the Complaint”).

21 Relatedly, the Rhode Island Attorney General has stated that the attorney client privileged
22 is not asserted for communications between the Rhode Island Attorney General and these state
23 agencies “unless the Office has explicitly agreed to represent a state agency.” [Dkt. 738-30 at 2].
24 The fact that the agencies had not formally retained the Attorney General as of the date of the
25 submission of their brief does not alter the reality that, under the statutory scheme, they will be
26 retained by the Attorney General once discovery formally is initiated against them by Meta (whether
27 by Rule 45 subpoena or by party discovery pursuant to this Order). The fact that the Rhode Island
28 Attorney General implicitly acknowledges that it could be retained by these agencies (and thus the

1 attorney-client privilege would apply to communications with the agencies) further supports the
2 conclusion of control here. Assertion of the attorney-client privilege requires, as a prerequisite, the
3 existence of an attorney-client relationship. *See Graf*, 610 F.3d at 1156.

4 Further the Rhode Island Attorney General explicitly argues that communications between
5 the state agencies and the Attorney General may be protected by the work product doctrine. [Dkt/
6 738-30 at 2]. The fact that the Rhode Island Attorney General asserts that pre-suit communications
7 with the state agencies may be protected by the work product doctrine is an implicit admission that
8 these agencies may have been involved in pre-suit investigations, may have interests in the outcome
9 of this case, and (at a minimum) worked with the Attorney General on this case in a pre-suit attorney-
10 client relationship. As discussed above, case law recognizes that factors that support a finding of
11 control include situations where the third party has an interest in the outcome of the matter and
12 where the third party participated in the preparation of or prosecution of the matter behind the scenes
13 as an unnamed party. *See, e.g., Hitachi*, 2006 WL 1038248, at *1. Asserting the work product
14 doctrine over communications with state agencies thus further supports a finding of control here.

15 The Court rejects the Rhode Island Attorney General's attempt to simultaneously disclaim
16 the existence of an attorney-client privilege over communications with the agencies at issue, while
17 apparently attempting to preserve the ability to assert work product protection applies to
18 communications between the Rhode Island Attorney General's Office and these agencies. "[I]t is
19 inconsistent for the State to argue that on one hand the [State] Attorney General represents these
20 individuals, but that for discovery purposes the [Plaintiff] United States must resort to Federal Rule
21 of Civil Procedure 45." *Perez*, 2014 WL 1796661, at *2.

22 The Court recognizes that this is a somewhat unusual situation, in which a law enforcement
23 organization (the Attorney General) is both counsel to a party to the case while also acting or able
24 to act as counsel for a third party. However, this would not be the first time that a legal services
25 provider, as counsel for a party, is found to have control over third party documents for purposes of
26 discovery. *See, e.g., Becnel*, 2018 WL 691649, at *4 ("Both Salas individually and his law firm,
27 the subpoena recipients and defendants in this court, are counsel of record for the Salas defendants
28 in the Florida lawsuit Thus, a Rule 34 request for production to Salas in the Florida lawsuit

1 required Salas to respond as to responsive materials over which Salas and his law firm had
2 possession, custody or control.”). Indeed, one court has noted that “[i]n general, an attorney is
3 presumed to have control over documents in its client’s possession.” *Perez*, 2014 WL 1796661, at
4 *2. The Court is not holding broadly that there must be a finding of a legal right of access to and
5 thus control over third party client documents in every case involving a legal services provider as a
6 party; rather, under the particular facts here, and under the totality of circumstances viewed in light
7 of applicable legal standards, the Court finds that control exists here.

8 Further, the Rhode Island Attorney General argues that the Rhode Island Attorney General
9 is a separate and distinct elected entity with separate duties and responsibilities. Dkt. 738-30 at 2
10 (“Rhode Island state agencies are represented by separate and distinct legal counsel, and Rhode
11 Island laws only delegate such a right or duty in limited circumstances.”). However, this argument
12 misapprehends the “legal control” test for documents – the issue is not simply whether one entity is
13 under the day-to-day operational control of the other (such as a parent-wholly-owned-subsidiary
14 relationship), and not simply whether the two entities are legally separate (such as two different and
15 separately incorporated entities), but rather whether there is a legal right to obtain the documents as
16 explained by *Citric Acid*. “The control analysis for Rule 34 purposes does not require the party to
17 have actual managerial power over the foreign corporation, but rather that there be close
18 coordination between them.” *St. Jude Medical S.C., Inc.*, 305 F.R.D. at 638. Here, the attorney-
19 client relationship between the state Attorney General and the state agencies (a relationship
20 mandated by state law) necessitates close coordination. While operational control may be a factual
21 situation which demonstrates a legal right to obtain the documents, the absence of such “executive
22 or functional control” is not determinative for evaluating “control” for purposes of discovery. By
23 definition, the “legal control” issue for discovery arises when there are two legally distinct or
24 separate entities – otherwise, if only one entity were involved, there would be no dispute that party
25 discovery covered that one entity. As discussed above, courts have found “control” for purposes of
26 discovery where a party is clearly not in managerial control over the third-party, such as a subsidiary
27 having control over the documents of a parent corporation, or an individual government officer
28 having control over the documents of an entire agency. The Rhode Island Attorney General’s

arguments erroneously conflate the legal control issue with “operational control” or “functional independence” of each entity, and thus is insufficient to rebut a finding of legal control of the documents for purposes of discovery.

Therefore, the Court concludes that the Rhode Island Attorney General has legal control, for the purposes of discovery, over the documents held by the Rhode Island agencies listed by Meta.

XXX. SOUTH CAROLINA

In opposition to the control issue, the South Carolina Attorney General argues primarily the following factors: (1) the South Carolina Attorney General is a separate entity and independent from the South Carolina agencies; and (2) the South Carolina Attorney General brought the lawsuit under its own independent law enforcement capacity. [Dkt. 738-31 at 2].

In support of a finding of control with regard to these state agencies’ documents, Meta argues based primarily on the following factors: (1) that South Carolina agencies are proscriptively barred from obtaining counsel other than the South Carolina Attorney General, without consent from the South Carolina Attorney General, and (2) that the South Carolina Constitution and local law provides the South Carolina Attorney General the ability to require all state agencies to provide information in writing upon any subject. *Id.* at 3. Here, Meta seeks discovery from the following agencies: the Commission on Higher Education, Department of Administration Executive Budget Office, Department of Children’s Advocacy, Department of Commerce, Department of Consumer Affairs, Department of Education, Department of Health and Human Services, Department of Mental Health, Department of Social Services, Education Oversight Committee, and Office of the Governor. *Id.*

After considering the factors argued in the briefs, the Court finds that the factors weigh in favor of a finding that the South Carolina Attorney General does have legal control, for purposes of discovery, over the listed South Carolina agencies. While the South Carolina Attorney General is a separate entity and while the South Carolina Attorney General does bring the instant action in its own independent authority, this does not outweigh the requirement that the South Carolina Attorney General will act as the agencies’ counsel.

The statutory scheme in South Carolina requires that “the Attorney General *shall* conduct

1 all litigation which may be necessary for *any department of the state government* or any of the
2 boards connected therewith, and all these boards or departments are *forbidden to employ any*
3 *counsel* for any purpose except through the Attorney General and upon his advice[.]” S.C. Code
4 § 1-7-80 (emphasis added).

5 Indeed, the South Carolina Attorney General confirmed that its office could represent the
6 agencies at issue if Meta were to serve those agencies with a subpoena in this matter. [Dkt. 738-1
7 at 27–28]. Accordingly, under the statutory scheme each agency will be represented by the South
8 Carolina Attorney General in this matter for discovery.

9 Importantly, the South Carolina Attorney General’s arguments do not negate the fact that all
10 of the South Carolina agencies at issue here are barred by South Carolina law from obtaining counsel
11 other than the South Carolina Attorney General. S.C. Code § 1-7-80; *see also* S.C. Code § 1-7-160
12 (“[a] department or agency of state government may not hire a classified or temporary attorney as
13 an employee except upon the written approval of the Attorney General and at compensation
14 approved by him.”). This arrangement indicates strongly that the South Carolina Attorney General,
15 in fulfilling its statutory role for the state agencies, would necessarily and inherently have access to
16 and control over the necessary documents for effective legal representation of these state agencies.

17 Further, there is no statutory, legal, or administrative rule cited which prohibits the South
18 Carolina Attorney General from accessing the documents of the state agencies at issue. Indeed, the
19 contrary is true. South Carolina law permits the South Carolina Attorney General to access
20 agencies’ documents at the direction of the Governor. *See The State of South Carolina v. Purdue*
21 *Pharma L.P.*, No. 2017CP4004872, 2019 WL 3753945 (S.C.Com.Pl. July 05, 2019). In *Purdue*
22 *Pharma*, the South Carolina court found “unconvincing” the State of South Carolina’s refusal to
23 produce documents from certain agencies “on the ground that information in the possession,
24 custody, or control of executive agencies other than the Attorney General, as well as the Public
25 Employee Benefit Authority and Department of Health and Human Services (both of whom were
26 expressly named in the Amended Complaint), is outside of the State’s possession, custody, or
27 control.” *Id.* at *1. Based on the South Carolina Constitution, the *Purdue Pharma* court held that
28 “[a]s the legal representative of the executive branch, the Attorney General, at the direction of the

1 Governor, has the ability to require ‘[a]ll State officers, agencies, and institutions within the
2 Executive Branch’ to ‘give him information in writing upon any subject relating to the duties and
3 functions of their respective offices, agencies, and institutions.’” *Id.* (quoting S.C. Const. Art. IV,
4 § 17). Citing South Carolina Rule of Civil Procedure 34 (which is analogous to Fed. R. Civ. P. 34,
5 and includes the same “possession, custody, or control” language), the *Purdue Pharma* court held
6 that “the contested information nonetheless appears to be within the possession, custody or control
7 of the Attorney General.” *Id.*

8 Under *Citric Acid*, if there were a “legal mechanism” to obtain the documents (such as filing
9 a breach of contract action, which by definition would require seeking assistance in enforcement
10 from a judicial officer in a legal action), then there would have been a finding of “control” for
11 purposes of discovery. 191 F.3d at 1107-08. Here, under the South Carolina Constitution and
12 *Purdue Pharma*, there is a legal mechanism for the South Carolina Attorney General to obtain the
13 agencies’ documents. Under *Citric Acid*, the fact that enforcement was contingent on a court or
14 judicial officer exercising authority to grant relief in a breach of contract case did not detract from
15 the legal right to access; here analogously, the fact that direction from the Governor under the
16 Constitution did not (in *Purdue Pharma*) detract from the Attorney General’s legal right to access
17 the agencies’ documents. Based on the South Carolina Constitution and *Purdue Pharma*, the Court
18 finds that there is a legal right for the South Carolina Attorney General to access the state agencies’
19 documents upon demand, and thus “control” exists under Rule 34 for at least these reasons.

20 There is no citation to any statutory or legal prohibition on the South Carolina Attorney
21 General’s representing the state agencies in this matter for purposes of discovery. The Court
22 recognizes that this is a somewhat unusual situation, in which a law enforcement organization, the
23 attorney general, is a party to the case while also acting as counsel for a third party. However, this
24 would not be the first time that a legal services provider, as counsel for a party, is found to have
25 control over third party documents for purposes of discovery. *See, e.g., Becnel*, 2018 WL 691649,
26 at *4 (“Both Salas individually and his law firm, the subpoena recipients and defendants in this
27 court, are counsel of record for the Salas defendants in the Florida lawsuit Thus, a Rule 34
28 request for production to Salas in the Florida lawsuit required Salas to respond as to responsive

1 materials over which Salas and his law firm had possession, custody or control.”). Indeed, one court
2 has noted that “[i]n general, an attorney is presumed to have control over documents in its client’s
3 possession.” *Perez*, 2014 WL 1796661, at *2. The Court is not holding broadly that there must be
4 a finding of a legal right of access to and thus control over third party client documents in every
5 case involving a legal services provider as a party; rather, under the particular facts here, and under
6 the totality of circumstances viewed in light of applicable legal standards, the Court finds that
7 control exists here.

8 The South Carolina Attorney General’s role as counsel for the agencies at issue inherently
9 involves obtaining necessary documents for effective representation in litigation. In acting as
10 counsel, the South Carolina Attorney General would necessarily have access to and thus control
11 over the relevant documents needed to respond to discovery requests. *See Monsanto*, 2023 WL
12 4083934, at *5–6 (finding state Attorney General has control over agency documents “based on his
13 broad statutory and common law powers to control and manage legal affairs on behalf of state
14 agencies, has a legal right to obtain responsive documents from the state agencies referenced in the
15 Complaint”).

16 Relatedly, the South Carolina Attorney General has taken the position that communications
17 between the South Carolina Attorney General and these state agencies “would be protected under
18 the attorney-client privilege” if that office were retained by such agencies. [Dkt. 738-31 at 2]. The
19 fact that the agencies had not formally retained the Attorney General as of the date of the submission
20 of their brief does not alter the reality that, under the statutory scheme, they will be retained by the
21 Attorney General once discovery formally is initiated against them by Meta (whether by Rule 45
22 subpoena or by party discovery pursuant to this Order). The fact that the South Carolina Attorney
23 General admits could be retained by these agencies and thus the attorney-client privilege would
24 apply to communications with the agencies further supports the conclusion of control here.
25 Assertion of the attorney-client privilege requires, as a prerequisite, the existence of an attorney-
26 client relationship. *See Graf*, 610 F.3d at 1156.

27 Further the South Carolina Attorney General, like other states, argues that responding to a
28 subpoena “would be handled by different attorneys than those involved in this enforcement action”

1 and that therefore this “would not change the possession, custody, or control analysis.” *Id.* This
2 argument is not supported by citation to any law. The scope of attorney-client relationship (and the
3 duties flowing therefrom, including the scope of the attendant attorney-client privilege)
4 encompasses the entirety of a legal services organization due to well-known rules of imputation of
5 confidences to a legal services organization, including a public law office. *See, e.g., People ex rel.*
6 *Peters*, 951 P.2d at 930 (“The rule of imputed disqualification applies to both private firms and
7 public law firms such as a district attorney’s office or the office of the state public defender.”);
8 *accord City of Cnty. of Denver*, 37 P.3d at 457; *see also Kirk*, 108 Cal. Rptr. 3d at 637–38, 642 (“We
9 do not doubt that vicarious disqualification is the general rule, and that we should presume
10 knowledge is imputed to all members of a tainted attorney’s law firm. However, we conclude that,
11 in proper circumstances, the presumption is a rebuttable one[.]” The court recognizing presumption
12 of imputed knowledge in the context of government attorneys, which presumption could be rebutted
13 by proper ethical screening); *cf. also Billings*, 441 S.E.2d at 266 (because individual government
14 lawyer at issue “should be screened from any direct or indirect participation in the matter,” vicarious
15 disqualification of entire office denied); *cf. also Calhoun*, 492 S.W.3d at 137 (individual lawyer
16 disqualified when joining prosecutors’ office but “the entire office in which that attorney works is
17 not disqualified as long as the disqualified attorney is appropriately screened. Disqualification of
18 the entire prosecuting office is not necessary absent special facts, such as a showing of actual
19 prejudice; or, perhaps the screening procedures are ineffective.”). Some jurisdictions treat public
20 legal service organizations like private law firms and impute shared confidences among lawyers of
21 the entire public law entity. Even in jurisdictions which do not automatically impute
22 disqualification, and shared confidences, to an entire public law office, those courts recognize that
23 ethical screening or other procedures are required out of recognition that actual (as opposed to
24 imputed) sharing of confidences may occur and such procedures are required to avoid dissemination
25 of attorney-client privileged communications within an entire public law organization. This review
26 of case law demonstrates that there is insufficient legal support for South Carolina’s argument that
27 having different individual lawyers in the South Carolina Attorney General’s office represent the
28 agencies for discovery somehow inexplicably “would not change” the “control” analysis. [Dkt.

738-31 at 2].

The Court rejects the South Carolina Attorney General’s attempt to simultaneously disclaim the existence of an attorney-client privilege as between the attorneys currently “involved in this enforcement action,” while apparently attempting to preserve the ability to assert that the privilege applies to communications between other lawyers in the South Carolina Attorney General’s Office and these agencies. “[T]o the extent that [the State] asserts an attorney-client privilege with these legislators, it does so solely in their official capacities [I]t is inconsistent for the State to argue that on one hand the [State] Attorney General represents these individuals, but that for discovery purposes the [Plaintiff] United States must resort to Federal Rule of Civil Procedure 45.” *Perez*, 2014 WL 1796661, at *2.

To the extent the South Carolina Attorney General argues that the South Carolina Attorney General is a separate and distinct elected entity with separate duties and responsibilities from the state agencies, that argument is not persuasive. Dkt. 738-31 at 2 (“The [South Carolina Attorney General] does not share a common executive with any of these agencies, which stand independently from the Attorney General’s Office.”). This argument misapprehends the “legal control” test for documents – the issue is not simply whether one entity is under the day-to-day operational control of the other (such as a parent-wholly-owned-subsidiary relationship), and not simply whether the two entities are legally separate (such as two different and separately incorporated entities), but rather whether there is a legal right to obtain the documents as explained by *Citric Acid*. “‘The control analysis for Rule 34 purposes does not require the party to have actual managerial power over the foreign corporation, but rather that there be close coordination between them.’” *St. Jude Medical S.C., Inc.*, 305 F.R.D. at 638. Here, the attorney-client relationship between the state Attorney General and the state agencies (a relationship mandated by state law) necessitates close coordination. While operational control may be a factual situation which demonstrates a legal right to obtain the documents, the absence of such “executive or functional control” is not determinative for evaluating “control” for purposes of discovery. By definition, the “legal control” issue for discovery arises when there are two legally distinct or separate entities – otherwise, if only one entity were involved, there would be no dispute that party discovery covered that one entity. As discussed

1 above, courts have found “control” for purposes of discovery where a party is clearly not in
2 managerial control over the third-party, such as a subsidiary having control over the documents of
3 a parent corporation, or an individual government officer having control over the documents of an
4 entire agency. Thus, arguing that the South Carolina Attorney General “brings an action on behalf
5 of the State of South Carolina . . . and not as the legal representative or attorney of any department
6 or agency of state government,” dkt. 738-31 at 2, is simply re-stating the issue to be decided, and
7 not determinative of the issue. The South Carolina Attorney General’s arguments erroneously
8 conflate the legal control issue with “operational control” or “functional independence” of each
9 entity, and thus is insufficient to rebut a finding of legal control of the documents for purposes of
10 discovery.

11 Finally, the Court has recognized that the issue of control of state agency documents, when
12 a State or State Attorney General is a party, has been litigated and decided in a previous Multi-
13 District Litigation involving most of the same States and State Attorneys General as are involved in
14 this case. *Generic Pharmaceuticals (II)*, 699 F. Supp. 3d at 357–58. The *Generic Pharmaceuticals*
15 *(II)* opinion not only ruled against the objecting States, but also helpfully identified numerous States
16 which withdrew their objections to party discovery and negotiated a resolution of this issue with the
17 opposing party there. *Id.* at 356 n.5. In that case, South Carolina is identified as one of the States
18 which reached agreement on the state agency control issue without requiring that court to expend
19 resources resolving the dispute there. *Id.* Given that the *Generic Pharmaceuticals (II)* opinion
20 resolved the control issue against all the remaining objecting states and given that South Carolina
21 was able to reach a negotiated resolution of the dispute in that Multi-District Litigation, this Court
22 is disappointed that the South Carolina Attorney General and Meta were unable to reach a negotiated
23 resolution of this dispute. As the Court has repeatedly encouraged the Parties at multiple Discovery
24 Management Conferences, they should make every effort to work out discovery disputes through
25 reasonable, good faith negotiations between able and experienced counsel, particularly where, as
26 here, there is guidance in precedent on the discovery issue at hand.

27 Therefore, the Court concludes that the South Carolina Attorney General has legal control,
28 for the purposes of discovery, over the documents held by the South Carolina agencies listed by

1 Meta.

2 **XXXI. SOUTH DAKOTA**

3 In opposition to the control issue, the South Dakota Attorney General argues primarily the
4 following factors: (1) the South Dakota Attorney General is a separate entity and independent from
5 the South Dakota agencies; (2) the South Dakota Attorney General is not automatically required to
6 represent South Dakota agencies, and once such representation occurs, South Dakota law grants the
7 South Dakota Attorney General access to the South Dakota agencies' documents. [Dkt. 738-32 at
8 2].

9 In support of a finding of control with regard to these state agencies' documents, Meta argues
10 based primarily on the following factors: (1) the South Dakota Attorney General is South Dakota's
11 "representative in judicial proceedings;" and (2) no statute deprives the South Dakota Attorney
12 General from access to South Dakota agency documents. *Id.* at 3. Here, Meta seeks discovery from
13 the following agencies: the Board of Regents, Bureau of Finance and Management, Department of
14 Education, Department of Health, Department of Social Services, Governor's Office, and
15 Governor's Office of Economic Development. *Id.*

16 The statutory scheme in South Dakota requires that "[i]t is the duty of the attorney general:
17 (1) To appear for the state and prosecute and defend all actions and proceedings, civil or criminal,
18 in the Supreme Court, in which the state shall be interested as a party; [and] (2) When requested by
19 the Governor or either branch of the Legislature, or whenever, in the judgment of the attorney
20 general, the welfare of the state demands, to appear for the state and prosecute or defend, in any
21 court or before any officer, **any cause or matter, civil** or criminal, in which the state may be a party
22 or interested[.]" S.D. Codified Laws § 1-11-1 (emphasis added).

23 Indeed, the South Dakota Attorney General confirmed that its office could represent the
24 agencies at issue if Meta were to serve those agencies with a subpoena in this matter. [Dkt. 738-1
25 at 28–29]. As discussed above, no separate counsel has appeared for any of the state agencies at
26 issue. Accordingly, it appears that under the statutory scheme each agency will be represented by
27 the South Dakota Attorney General in this matter for discovery.

28 Further, there is no statutory, legal, or administrative rule cited which prohibits the South

1 Dakota Attorney General from accessing the documents of the state agencies at issue. Indeed, the
2 contrary is true. South Dakota law permits the South Dakota Attorney General to access agencies’
3 documents with consent of the Governor. S.D. Codified Laws § 1-11-10 (“Under such resolution
4 or order of the Governor, or the attorney general’s own relation with consent of the Governor, the
5 attorney general . . . shall have access to any and all books, blanks, . . . and materials and equipment
6 of the office, department, bureau, board, commission, or any other component part of the state
7 government or any branch, arm, or agency of the government[.]”). The South Dakota Attorney
8 General admits that there are other specific statutes giving the Attorney General the right to access
9 certain agencies’ documents under certain conditions. [Dkt. 738-32 at 2]. In *Citric Acid*, the lack
10 of control was based on a lack of “legal mechanism” to obtain the documents (such as filing a breach
11 of contract action, which by definition would require seeking assistance in enforcement from a
12 judicial officer in a legal action). 191 F.3d at 1107-08. Here, under these statutes, there appear to
13 be legal mechanisms for the South Dakota Attorney General to obtain the documents – for example,
14 under Section 1-11-10, the Attorney General has the legal authority under its “own relation” to have
15 access to the records of any agency, with the assistance and consent of the Governor. Under *Citric*
16 *Acid*, the fact that enforcement was contingent on a court or judicial officer exercising authority to
17 grant relief in a breach of contract case did not detract from the legal right to access; here
18 analogously, the fact that consent is required from the Governor under the statute should not detract
19 from the Attorney General’s legal right to access the agencies’ documents.

20 The South Dakota Attorney General does not provide any citation to any statutory or legal
21 prohibition on the South Dakota Attorney General’s representing the state agencies in this matter
22 for purposes of discovery. See Dkt. 738-32 at 2. The Court recognizes that this is a somewhat
23 unusual situation, in which a law enforcement organization (the attorney general) is both a party to
24 the case while also acting or able to act as counsel for a third party. However, this would not be the
25 first time that a legal services provider, as counsel for a party, is found to have control over third
26 party documents for purposes of discovery. See, e.g., *Becnel*, 2018 WL 691649, at *4 (“Both Salas
27 individually and his law firm, the subpoena recipients and defendants in this court, are counsel of
28 record for the Salas defendants in the Florida lawsuit Thus, a Rule 34 request for production

1 to Salas in the Florida lawsuit required Salas to respond as to responsive materials over which Salas
2 and his law firm had possession, custody or control.”). Indeed, one court has noted that “[i]n general,
3 an attorney is presumed to have control over documents in its client’s possession.” *Perez*, 2014 WL
4 1796661, at *2. The Court is not holding broadly that there must be a finding of a legal right of
5 access to and thus control over third party client documents in every case involving a legal services
6 provider as a party; rather, under the particular facts here, and under the totality of circumstances
7 viewed in light of applicable legal standards, the Court finds that control exists here.

8 Relatedly, the South Dakota Attorney General has taken the position that communications
9 between the South Dakota Attorney General and these state agencies would be covered by the
10 attorney-client privilege. [Dkt. 738-32 at 2]. The fact that the South Dakota Attorney General
11 admits it “may appear on behalf of the state agencies” and thus “would assert” that communications
12 with the agencies are privileged further supports the conclusion of control here. Assertion of the
13 attorney-client privilege requires, as a prerequisite, the existence of an attorney-client relationship.
14 *See Graf*, 610 F.3d at 1156.

15 Finally, the Court has recognized that the issue of control of state agency documents, when
16 a State or State Attorney General is a party, has been litigated and decided in a previous Multi-
17 District Litigation involving most of the same States and State Attorneys General as are involved in
18 this case. *Generic Pharmaceuticals (II)*, 699 F. Supp. 3d at 357–58. The *Generic Pharmaceuticals*
19 *(II)* opinion not only ruled against the objecting States, but also helpfully identified numerous States
20 which withdrew their objections to party discovery and negotiated a resolution of this issue with the
21 opposing party there. *Id.* at 356 n.5. In that case, South Dakota is identified as one of the States
22 which reached agreement on the state agency control issue without requiring that court to expend
23 resources resolving the dispute there. *Id.* Given that the *Generic Pharmaceuticals (II)* opinion
24 resolved the control issue against all the remaining objecting states and given that South Dakota was
25 able to reach a negotiated resolution of the dispute in that Multi-District Litigation, this Court is
26 disappointed that the South Dakota Attorney General and Meta were unable to reach a negotiated
27 resolution of this dispute. As the Court has repeatedly encouraged the Parties at multiple Discovery
28 Management Conferences, they should make every effort to work out discovery disputes through

1 reasonable, good faith negotiations between able and experienced counsel, particularly where, as
2 here, there is guidance in precedent on the discovery issue at hand.

3 Therefore, the Court concludes that the South Dakota Attorney General has legal control,
4 for the purposes of discovery, over the documents held by the South Dakota agencies listed by
5 Meta.

6 **XXXII. VIRGINIA**

7 In opposition to the control issue, the Virginia Attorney General argues primarily the
8 following factors: (1) the Virginia Attorney General is a separate entity and independent from the
9 Virginia agencies; and (2) the Virginia Attorney General brought the lawsuit under its own
10 independent law enforcement capacity. [Dkt. 738-33 at 2].

11 In support of a finding of control with regard to these state agencies' documents, Meta argues
12 based primarily on the following factors: (1) the Virginia Attorney General is required to conduct
13 all legal services for Virginia agencies, and (2) Virginia law prohibits the Governor and agencies
14 from employing regular counsel. *Id.* at 3. Here, Meta seeks discovery from the following agencies:
15 the Department of Behavioral Health and Developmental Services, Department of Education,
16 Department of Health, Department of Planning and Budget, Department of Social Services,
17 Economic Development Partnership, Foundation for Healthy Youth, Office of Children's Services,
18 and Office of the Governor. *Id.*

19 After considering the factors argued in the briefs, the Court finds that the factors weigh in
20 favor of a finding that the Virginia Attorney General does have legal control, for purposes of
21 discovery, over the listed Virginia agencies. While the Virginia Attorney General is a separate entity
22 and while the Virginia Attorney General brought the instant action pursuant to its own authority,
23 this does not outweigh the requirement that the Virginia Attorney General will act as the agencies'
24 counsel.

25 The statutory scheme in Virginia requires that "[a]ll legal service in civil matters for the
26 Commonwealth, the **Governor, and every** state department, institution, division, commission,
27 board, bureau, **agency**, entity, official, court, or judge, including the conduct of **all civil litigation** in
28 which any of them are interested, **shall** be rendered and performed by the Attorney General." Va.

1 Code § 2.2-507 (emphasis added). Additionally, Virginia law requires that “[n]o regular counsel
2 shall be employed for or by the Governor or any state department, institution, division, commission,
3 board, bureau, agency, entity, or official.” *Id.*

4 Indeed, the Virginia Attorney General confirmed that its office will definitely represent all
5 the agencies at issue if Meta were to serve those agencies with a subpoena in this matter. [Dkt. 738-
6 1 at 29–30]. Accordingly, under the statutory scheme each agency will be represented by the
7 Virginia Attorney General in this matter for discovery (whether for party discovery under Rule 34
8 or for subpoenas under Rule 45).

9 Importantly, the Virginia Attorney General’s arguments do not negate the fact that all of the
10 Virginia agencies at issue here are barred by Virginia law from obtaining counsel other than the
11 Virginia Attorney General, absent certain special conditions not present here. Va. Code § 2.2-510
12 (requiring Governor approval, where it is impracticable or uneconomical for the Virginia Attorney
13 General to render such services, or where the Virginia Attorney General must certify to the Governor
14 that it is unable to render certain legal services). Here, no separate counsel has entered appearance
15 for any of the state agencies, and indeed based on the Virginia Attorney General’s confirmation of
16 representation, none is expected to. This arrangement indicates strongly that the Virginia Attorney
17 General, in fulfilling its statutory role for the state agencies, would necessarily and inherently have
18 access to and control over the necessary documents for effective legal representation of these state
19 agencies.

20 Relatedly, the Virginia Attorney General has taken the position that communications
21 between the Virginia Attorney General and these state agencies “could” be covered by the attorney-
22 client privilege. [Dkt. 738-33 at 2]. To the extent the Virginia Attorney General has attempted to
23 subdivide its own office between the Attorney General’s Consumer Protection Section litigating this
24 case as opposed to “attorneys in other sections of the Department of Law” in order to somehow
25 argue that the scope of attorney-client privilege is limited only as to some parts of the state Virginia
26 Attorney General’s office but not other “sections,” that argument is not supported by citation to law
27 and is contrary to the weight of law. The scope of attorney-client relationship (and the duties flowing
28 therefrom, including the scope of the attendant attorney-client privilege) encompasses the entirety

of a legal services organization due to well-known rules of imputation of confidences to a legal services organization, including a public law office. *See, e.g., People ex rel. Peters*, 951 P.2d at 930 (“The rule of imputed disqualification applies to both private firms and public law firms such as a district attorney’s office or the office of the state public defender.”); *accord City of Cnty. of Denver*, 37 P.3d at 457; *see also Kirk*, 108 Cal. Rptr. 3d at 637–38, 642 (“We do not doubt that vicarious disqualification is the general rule, and that we should presume knowledge is imputed to all members of a tainted attorney’s law firm. However, we conclude that, in proper circumstances, the presumption is a rebuttable one[.]” The court recognizing presumption of imputed knowledge in the context of government attorneys, which presumption could be rebutted by proper ethical screening); *cf. also Billings*, 441 S.E.2d at 266 (because individual government lawyer at issue “should be screened from any direct or indirect participation in the matter,” vicarious disqualification of entire office denied); *cf. also Calhoun*, 492 S.W.3d at 137 (individual lawyer disqualified when joining prosecutors’ office but “the entire office in which that attorney works is not disqualified as long as the disqualified attorney is appropriately screened. Disqualification of the entire prosecuting office is not necessary absent special facts, such as a showing of actual prejudice; or, perhaps the screening procedures are ineffective.”). Some jurisdictions treat public legal service organizations like private law firms and impute shared confidences among lawyers of the entire public law entity. Even in jurisdictions which do not automatically impute disqualification, and shared confidences, to an entire public law office, those courts recognize that ethical screening or other procedures are required out of recognition that actual (as opposed to imputed) sharing of confidences may occur and such procedures are required to avoid dissemination of attorney-client privileged communications within an entire public law organization. This review of case law demonstrates that there is insufficient legal support for Virginia’s argument that different individual lawyers in the Virginia Attorney General’s office have *ex ante* separable, discrete attorney-client relationships.

The Court rejects the Virginia Attorney General’s attempt to simultaneously disclaim the existence of an attorney-client privilege as between the “section” of attorneys currently working on this case, while apparently attempting to preserve the ability to assert that the privilege applies to

communications between other lawyers in the Virginia Attorney General’s Office and these agencies. “[T]o the extent that [the State] asserts an attorney-client privilege with these legislators, it does so solely in their official capacities [I]t is inconsistent for the State to argue that on one hand the [State] Attorney General represents these individuals, but that for discovery purposes the [Plaintiff] United States must resort to Federal Rule of Civil Procedure 45.” *Perez*, 2014 WL 1796661, at *2. The fact that the Virginia Attorney General is attempting to preserve the ability to assert the attorney-client privilege between the Virginia Attorney General’s office and the agencies at issue further supports the conclusion of control here. Assertion of the attorney-client privilege requires, as a prerequisite, the existence of an attorney-client relationship. *See Graf*, 610 F.3d at 1156.

The Virginia Attorney General’s role as counsel for the agencies at issue inherently involves obtaining necessary documents for effective representation in litigation. In acting as counsel, the Virginia Attorney General would necessarily have access to and thus control over the relevant documents needed to respond to discovery requests. *See Monsanto*, 2023 WL 4083934, at *5–6 (finding state Attorney General has control over agency documents “based on his broad statutory and common law powers to control and manage legal affairs on behalf of state agencies, has a legal right to obtain responsive documents from the state agencies referenced in the Complaint”).

Further, the Virginia Attorney General argues that the Virginia Attorney General and the Virginia Governor are “separately elected constitutional officers with distinct duties and independent authority.” Dkt. 738-33 at 2 (citations omitted). However, this argument misapprehends the “legal control” test for documents – the issue is not simply whether one entity is under the day-to-day operational control of the other (such as a parent-wholly-owned-subsidiary relationship), and not simply whether the two entities are legally separate (such as two different and separately incorporated entities), but rather whether there is a legal right to obtain the documents as explained by *Citric Acid*. “The control analysis for Rule 34 purposes does not require the party to have actual managerial power over the foreign corporation, but rather that there be close coordination between them.” *St. Jude Medical S.C., Inc.*, 305 F.R.D. at 638. Here, the attorney-client relationship between the state Attorney General and the state agencies (a relationship

1 mandated by state law) necessitates close coordination. While operational control may be a factual
2 situation which demonstrates a legal right to obtain the documents, the absence of such “executive
3 or functional control” is not determinative for evaluating “control” for purposes of discovery. By
4 definition, the “legal control” issue for discovery arises when there are two legally distinct or
5 separate entities – otherwise, if only one entity were involved, there would be no dispute that party
6 discovery covered that one entity. As discussed above, courts have found “control” for purposes of
7 discovery where a party is clearly not in managerial control over the third-party, such as a subsidiary
8 having control over the documents of a parent corporation, or an individual government officer
9 having control over the documents of an entire agency. Thus, arguing that the Virginia Attorney
10 General brought this action “pursuant to the Attorney General’s own authority to enforce the
11 Virginia Consumer Protection Act[,]” dkt 738-33 (citing Va. Code § 59.1-203), is simply re-stating
12 the issue to be decided, and not determinative of the issue. The Virginia Attorney General’s
13 arguments erroneously conflate the legal control issue with “operational control” or “functional
14 independence” of each entity, and thus is insufficient to rebut a finding of legal control of the
15 documents for purposes of discovery.

16 Therefore, the Court concludes that the Virginia Attorney General has legal control, for the
17 purposes of discovery, over the documents held by the Virginia agencies listed by Meta.

18 **XXXIII. WASHINGTON**

19 In opposition to the control issue, the Washington Attorney General argues primarily the
20 following factors: (1) the Washington Attorney General is a separate entity and independent from
21 the Washington agencies; and (2) the Washington Attorney General brought the lawsuit under its
22 own independent law enforcement capacity. [Dkt. 738-34 at 2].

23 In support of a finding of control with regard to these state agencies’ documents, Meta argues
24 based primarily on the following factors: (1) the Washington Attorney General must act as counsel
25 for the Washington agencies; and (2) the Washington Attorney General has already confirmed that
26 it would represent the identified agencies in responding to a Meta subpoena. *Id.* at 3. Here, Meta
27 seeks discovery from the following agencies: the Department of Children, Youth, and Families;
28 Department of Health; Health Care Authority; Office of Financial Management Washington Office

1 of the Governor; Board of Education; Board of Health; Department of Commerce; Department of
2 Health; and Department of Social and Health Services. *Id.*

3 After considering the factors argued in the briefs, the Court finds that the factors weigh in
4 favor of a finding that the Washington Attorney General does have legal control, for purposes of
5 discovery, over the listed Washington agencies. While the Washington Attorney General is a
6 separate entity and while the Washington Attorney General does bring the instant action in its own
7 independent authority, this does not outweigh the requirement that the Washington Attorney
8 General will act as the agencies' counsel.

9 The statutory scheme in Washington requires that "[t]he attorney general ***shall*** also represent
10 the state and all officials, departments, boards, commissions and ***agencies*** of the state in the courts,
11 and before all administrative tribunals or bodies of any nature, ***in all legal or quasi legal matters***,
12 hearings, or proceedings, and advise all officials, departments, boards, commissions, or agencies of
13 the state in all matters involving legal or quasi legal questions, except those declared by law to be
14 the duty of the prosecuting attorney of any county." Wash. Rev. Code § 43.10.040 (emphasis
15 added).

16 Indeed, the Washington Attorney General confirmed that its office would definitely
17 represent all the agencies at issue if Meta were to serve those agencies with a subpoena in this matter.
18 [Dkt. 738-1 at 30]. Accordingly, under the statutory scheme each agency will be represented by the
19 Washington Attorney General in this matter for discovery (whether or not sought under Rule 34 or
20 under Rule 45).

21 Relatedly, the Washington Attorney General has taken the position that communications
22 between the Washington Attorney General and these state agencies would be covered by the
23 attorney-client privilege. [Dkt. 738-34 at 2]. To the extent the Washington Attorney General has
24 attempted to subdivide its own office between the "CP Division" litigating this case and other "AGO
25 attorneys" in order to somehow argue that the scope of attorney-client privilege is limited only as to
26 some parts of the state Washington General's office but not other sub-teams, that argument is not
27 supported by citation to law and is contrary to the weight of law. The scope of an attorney-client
28 relationship (and the duties flowing therefrom, including the scope of the attendant attorney-client

1 privilege) encompasses the entirety of a legal services organization due to well-known rules of
2 imputation of confidences to a legal services organization, including a public law office. *See, e.g.,*
3 *People ex rel. Peters*, 951 P.2d at 930 (“When an attorney associates with a law firm, the principle
4 of loyalty to the client extends beyond the individual attorney and applies with equal force to the
5 other attorneys practicing in the firm. This principle, known as the ‘rule of imputed disqualification,’
6 . . . requires disqualification of all members of a law firm when any one of them practicing alone
7 would be disqualified because of a conflict of interest The rule of imputed disqualification
8 applies to both private firms and public law firms such as a district attorney’s office or the office of
9 the state public defender.”); *accord City of Cnty. of Denver*, 37 P.3d at 457; *see also Kirk*, 108 Cal.
10 Rptr. 3d at 637–38, 642 (“We do not doubt that vicarious disqualification is the general rule, and
11 that we should presume knowledge is imputed to all members of a tainted attorney’s law firm.
12 However, we conclude that, in proper circumstances, the presumption is a rebuttable one[.]” The
13 court recognizing presumption of imputed knowledge in the context of government attorneys, which
14 presumption could be rebutted by proper ethical screening); *cf. also Billings*, 441 S.E.2d at 266
15 (because individual government lawyer at issue “should be screened from any direct or indirect
16 participation in the matter,” vicarious disqualification of entire office denied); *cf. also Calhoun*, 492
17 S.W.3d at 137 (individual lawyer disqualified when joining prosecutors’ office but “the entire office
18 in which that attorney works is not disqualified as long as the disqualified attorney is appropriately
19 screened. Disqualification of the entire prosecuting office is not necessary absent special facts, such
20 as a showing of actual prejudice; or, perhaps the screening procedures are ineffective.”). Some
21 jurisdictions treat public legal service organizations like private law firms and impute shared
22 confidences among lawyers of the entire public law entity. Even in jurisdictions which do not
23 automatically impute disqualification, and shared confidences, to an entire public law office, those
24 courts recognize that ethical screening or other procedures are required out of recognition that actual
25 (as opposed to imputed) sharing of confidences may occur and such procedures are required to avoid
26 dissemination of attorney-client privileged communications within an entire public law
27 organization. This review of case law demonstrates that no courts support Washington’s argument
28 that different individual lawyers in the Washington Attorney General’s office have *ex ante*

1 separable, discrete attorney-client relationships.

2 The Court rejects the Washington Attorney General's attempt to simultaneously disclaim
3 the existence of an attorney-client privilege as between the "CP Division" of attorneys currently
4 working on this case, while apparently attempting to preserve the ability to assert that the privilege
5 applies to communications between other lawyers in the Washington Attorney General's Office and
6 these agencies. "[T]o the extent that [the State] asserts an attorney-client privilege with these
7 legislators, it does so solely in their official capacities [I]t is inconsistent for the State to argue
8 that on one hand the [State] Attorney General represents these individuals, but that for discovery
9 purposes the [Plaintiff] United States must resort to Federal Rule of Civil Procedure 45." *Perez*,
10 2014 WL 1796661, at *2. The fact that the Washington Attorney General is attempting to preserve
11 the ability to assert the attorney-client privilege between the Washington Attorney General's office
12 and the agencies at issue further supports the conclusion of control here. Assertion of the attorney-
13 client privilege requires, as a prerequisite, the existence of an attorney-client relationship. *See Graf*,
14 610 F.3d at 1156.

15 The Washington Attorney General's role as counsel for the agencies at issue inherently
16 involves obtaining necessary documents for effective representation in litigation. In *Rhea*, the
17 Washington Attorney General was representing a state agency and was sanctioned by the
18 Washington District Court for failure to properly search for sources of information to provide
19 documents in discovery. *Rhea*, 2010 WL 5395009 at *6-7 (counsel 'has an obligation to not just
20 request documents of his client, but to search for sources of information.'). In acting as counsel,
21 the Washington Attorney General has both discovery duties under the Federal Rules but also ethical
22 and professional duties which would necessarily provide access to and thus control over the relevant
23 documents needed to respond to discovery requests. *See Monsanto*, 2023 WL 4083934, at *5-6
24 (finding state Attorney General has control over agency documents "based on his broad statutory
25 and common law powers to control and manage legal affairs on behalf of state agencies, has a legal
26 right to obtain responsive documents from the state agencies referenced in the Complaint").

27 Further, the Washington Attorney General argues that the Washington Attorney General is
28 a separate and distinct elected entity with separate duties and responsibilities. Dkt. 738-34 at 2

(citations omitted). However, this argument misapprehends the “legal control” test for documents – the issue is not simply whether one entity is under the day-to-day operational control of the other (such as a parent-wholly-owned-subsidiary relationship), and not simply whether the two entities are legally separate (such as two different and separately incorporated entities), but rather whether there is a legal right to obtain the documents as explained by *Citric Acid*. ““The control analysis for Rule 34 purposes does not require the party to have actual managerial power over the foreign corporation, but rather that there be close coordination between them.”” *St. Jude Medical S.C., Inc.*, 305 F.R.D. at 638. Here, the attorney-client relationship between the state Attorney General and the state agencies (a relationship mandated by state law) necessitates close coordination. While operational control may be a factual situation which demonstrates a legal right to obtain the documents, the absence of such “executive or functional control” is not determinative for evaluating “control” for purposes of discovery. By definition, the “legal control” issue for discovery arises when there are two legally distinct or separate entities – otherwise, if only one entity were involved, there would be no dispute that party discovery covered that one entity. As discussed above, courts have found “control” for purposes of discovery where a party is clearly not in managerial control over the third-party, such as a subsidiary having control over the documents of a parent corporation, or an individual government officer having control over the documents of an entire agency. Thus, arguing that the Washington Attorney General is not suing on behalf of or representing any state agency in this litigation and arguing that this action is brought under independent statutory authority, *dkt. 738-34 at 2*, is simply re-stating the issue to be decided, and not determinative of the issue. The Washington Attorney General’s arguments erroneously conflate the legal control issue with “operational control” or “functional independence” of each entity, and thus is insufficient to rebut a finding of legal control of the documents for purposes of discovery.

Furthermore, the Western District of Washington’s *Wilson v. Washington*, No. C16-5366 BHS, 2017 WL 518615 (W.D. Wash. Feb. 8, 2017), opinion on “control” involving Washington State agencies is instructive. In *Wilson*, the plaintiffs sued the State of Washington, one specific agency, and an individual official of the state. The defendants, represented by the Washington Attorney General, objected to document requests on that grounds “that they lack control or custody

1 of information sought by Plaintiff. Specifically, they argue that the requested information is held
2 by state agencies ***not listed as defendants.***” *Id.* at *3. The Washington district judge ruled that
3 “[t]his argument is unavailing.” *Id.* (citing *Soto*, 162 F.R.D. at 619). Here, as in *Wilson*, the State
4 of Washington is a named plaintiff (along with the Attorney General as relator). Here, as in *Wilson*,
5 the Washington Attorney General argued that unnamed state agencies’ documents are outside the
6 control of the named parties. Here, as in *Wilson*, the Washington Attorney General is essentially
7 repeating the same asserted arguments which the Washington federal district court rejected.

8 This is not the only instance in which a Washington district court rejected similar state
9 agency arguments by the Washington Attorney General. In *Geo*, the State of Washington
10 (represented, as here, by the Washington Attorney General) objected to document requests on the
11 grounds that the Attorney General’s Office lacked control over state agencies. *GEO Grp., Inc.*, 2018
12 WL 9457998, at *2. Geo sought documents from four agencies (including the Department of Social
13 and Health Services and the Washington Governor’s Office, both at issue in this case as well), and
14 the Washington Attorney General argued lack of control because those agencies were not parties to
15 the suit and the lawsuit was initiated as *parens patriae*. *Id.* In seeking to compel party discovery as
16 against these state agencies, “GEO contends that the AGO has actual control over information held
17 by state agencies because of the AGO’s requisite relationship with them and statutory power to
18 represent them.” *Id.* The *Geo* Court found that “[i]n this Court’s view, where the plaintiff is the
19 State of Washington, discovery addressed to the State of Washington includes its agencies. Because
20 the AGO is the law firm to the State of Washington, the AGO should respond to and produce
21 discovery on behalf of the State of Washington, including its agencies.” *Id.* at *3.

22 The *Geo* opinion distinguished precedent partially on the grounds that the litigation in *Geo*
23 was initiated *parens patriae* whereas the litigation in the precedent was “effectively, an enforcement
24 action on behalf of another agency” where the State was a nominal party. *Id.* (distinguishing
25 *Boardman*, 233 F.R.D. at 265). However, the *Geo* opinion also distinguished *Boardman* on the
26 grounds that the precedent “relied heavily analyzing the Constitution for the State of New York, a
27 different state.” *Id.* Further, the *Geo* opinion cited approvingly the *Wilson* opinion discussed above,
28 and in *Wilson* the finding of control was not based on distinguishing litigation *parens patriae* versus

1 an agency enforcement action. *Wilson*, 2017 WL 518615, at *3.

2 Finally, the Court has recognized that the issue of control of state agency documents, when
3 a State or State Attorney General is a party, has been litigated and decided in a previous Multi-
4 District Litigation involving most of the same States and State Attorneys General as are involved in
5 this case. *Generic Pharmaceuticals (II)*, 699 F. Supp. 3d at 357–58. The *Generic Pharmaceuticals*
6 (*II*) opinion not only ruled against the objecting States, but also helpfully identified numerous States
7 which withdrew their objections to party discovery and negotiated a resolution of this issue with the
8 opposing party there. *Id.* at 356 n.5. In that case, Washington is identified as one of the States
9 which reached agreement on the state agency control issue without requiring that court to expend
10 resources resolving the dispute there. *Id.* Given that the *Generic Pharmaceuticals (II)* opinion
11 resolved the control issue against all the remaining objecting states and given that Washington was
12 able to reach a negotiated resolution of the dispute in that Multi-District Litigation, this Court is
13 disappointed that the Washington Attorney General and Meta were unable to reach a negotiated
14 resolution of this dispute. As the Court has repeatedly encouraged the Parties at multiple Discovery
15 Management Conferences, they should make every effort to work out discovery disputes through
16 reasonable, good faith negotiations between able and experienced counsel, particularly where, as
17 here, there is guidance in precedent on the discovery issue at hand.

18 Therefore, the Court concludes that the Washington Attorney General has legal control, for
19 the purposes of discovery, over the documents held by the Washington agencies listed by Meta.

20 **XXXIV. WEST VIRGINIA**

21 In opposition to the control issue, the West Virginia Attorney General argues primarily the
22 following factors: (1) the West Virginia Attorney General brought the lawsuit under its own
23 independent law enforcement capacity; and (2) the West Virginia Attorney General is a separate
24 entity and independent from the West Virginia agencies. [Dkt. 738-35 at 2].

25 In support of a finding of control with regard to these state agencies' documents, Meta argues
26 based primarily on the following factors: the West Virginia Attorney General must act as counsel
27 for the West Virginia agencies absent the existence of statutory exemptions (not present here). *Id.*
28 at 3. Here, Meta seeks discovery from the following agencies: the Bureau for Children and Families,

1 Department of Education, Department of Health and Human Resources, Development Office,
2 Governor's Office, State Budget Office, Department of Education. *Id.*

3 After considering the factors argued in the briefs, the Court finds that the factors weigh in
4 favor of a finding that the West Virginia Attorney General does have legal control, for purposes of
5 discovery, over the listed West Virginia agencies. While the West Virginia Attorney General is a
6 separate entity and while the West Virginia Attorney General does bring the instant action in its own
7 independent authority, this does not outweigh the requirement that the West Virginia Attorney
8 General will act as the agencies' counsel.

9 The statutory scheme in West Virginia requires that "[t]he attorney general shall give written
10 opinions and advice upon questions of law, and **shall** prosecute and defend suits, actions, and other
11 legal proceedings, and generally render and perform all other legal services, whenever required to
12 do so, in writing, by the governor . . . or any other state officer, board or commission, or the head of
13 any state educational, correctional, penal or eleemosynary institution[.]" W. Va. Code § 5-3-1
14 (emphasis added). Furthermore, "[t]he attorney general **shall** appear as counsel for the state **in all**
15 **causes** pending in . . . **any federal court**, in which the state is interested; . . . and when such
16 appearance is entered he shall take charge of and have control of such cause[.]" W. Va. Code § 5-
17 3-2 (emphasis added). As discussed above, no separate counsel has appeared for any of the agencies
18 here, and on the record presented, it appears that under the statutory scheme the West Virginia
19 Attorney General will represent these agencies.

20 Indeed, the West Virginia Attorney General confirmed that its office could represent the
21 agencies at issue if Meta were to serve those agencies with a subpoena in this matter. [Dkt. 738-1
22 at 31]. Accordingly, it appears that under the statutory scheme each agency will be represented by
23 the West Virginia Attorney General in this matter for discovery.

24 Further, there is no statutory, legal, or administrative rule cited which prohibits the West
25 Virginia Attorney General from accessing the documents of the state agencies at issue. Nor is there
26 citation to any statutory or legal prohibition on the West Virginia Attorney General's representing
27 the state agencies in this matter for purposes of discovery. The Court recognizes that this is a
28 somewhat unusual situation, in which a law enforcement organization (the attorney general) is both

1 a party to the case while also acting or able to act as counsel for a third party. However, this would
2 not be the first time that a legal services provider, as counsel for a party, is found to have control
3 over third party documents for purposes of discovery. *See, e.g., Becnel*, 2018 WL 691649, at *4
4 (“Both Salas individually and his law firm, the subpoena recipients and defendants in this court, are
5 counsel of record for the Salas defendants in the Florida lawsuit Thus, a Rule 34 request for
6 production to Salas in the Florida lawsuit required Salas to respond as to responsive materials over
7 which Salas and his law firm had possession, custody or control.”). Indeed, one court has noted that
8 “[i]n general, an attorney is presumed to have control over documents in its client’s possession.”
9 *Perez*, 2014 WL 1796661, at *2. The Court is not holding broadly that there must be a finding of a
10 legal right of access to and thus control over third party client documents in every case involving a
11 legal services provider as a party; rather, under the particular facts here, and under the totality of
12 circumstances viewed in light of applicable legal standards, the Court finds that control exists here.

13 Relatedly, the West Virginia Attorney General has taken the position that communications
14 between the West Virginia Attorney General and these state agencies would be covered by the
15 attorney-client privilege. [Dkt. 738-35 at 2]. To the extent the West Virginia Attorney General
16 argues that his office “does not represent any other state agency” *currently* in this action, but also
17 argues that “*when* the AG is serving as legal counsel for a state agency” then the privilege applies,
18 the West Virginia Attorney General plainly is attempting to preserve the ability to assert the
19 attorney-client privilege between the West Virginia Attorney General’s office and the agencies at
20 issue - and that position further supports the conclusion of control here. Parsing whether the
21 agencies *at the moment of the writing of their brief* may not have been represented by the West
22 Virginia Attorney General, but keeping open the obvious likelihood that they *will* be represented for
23 discovery under the statutory scheme in West Virginia, is a myopic argument which is not firmly
24 grounded in reality and not persuasive. “[T]o the extent that [the State] asserts an attorney-client
25 privilege with these legislators, it does so solely in their official capacities [I]t is inconsistent
26 for the State to argue that on one hand the [State] Attorney General represents these individuals, but
27 that for discovery purposes the [Plaintiff] United States must resort to Federal Rule of Civil
28 Procedure 45.” *Perez*, 2014 WL 1796661, at *2. The fact that the West Virginia Attorney General

1 is attempting to preserve the ability to assert the attorney-client privilege between the West Virginia
2 Attorney General's office and the agencies at issue further supports the conclusion of control here.
3 Assertion of the attorney-client privilege requires, as a prerequisite, the existence of an attorney-
4 client relationship. *See Graf*, 610 F.3d at 1156. And, as discussed above, "[i]n general, an attorney
5 is presumed to have control over documents in its client's possession." *Perez*, 2014 WL 1796661,
6 at *2. There is no showing here to rebut that presumption.

7 The West Virginia Attorney General's role as counsel for the agencies at issue inherently
8 involves obtaining necessary documents for effective representation in litigation. In acting as
9 counsel, the West Virginia Attorney General would necessarily have access to and thus control over
10 the relevant documents needed to respond to discovery requests. *See Monsanto*, 2023 WL 4083934,
11 at *5–6 (finding state Attorney General has control over agency documents "based on his broad
12 statutory and common law powers to control and manage legal affairs on behalf of state agencies,
13 has a legal right to obtain responsive documents from the state agencies referenced in the
14 Complaint"). Further, the West Virginia Attorney General argues that the West Virginia Attorney
15 General is a separate and distinct elected entity with separate duties and responsibilities. Dkt. 738-
16 35 at 2 (citations omitted). However, this argument misapprehends the "legal control" test for
17 documents – the issue is not simply whether one entity is under the day-to-day operational control
18 of the other (such as a parent-wholly-owned-subsidiary relationship), and not simply whether the
19 two entities are legally separate (such as two different and separately incorporated entities), but
20 rather whether there is a legal right to obtain the documents as explained by *Citric Acid*. "The
21 control analysis for Rule 34 purposes does not require the party to have actual managerial power
22 over the foreign corporation, but rather that there be close coordination between them." *St. Jude*
23 *Medical S.C., Inc.*, 305 F.R.D. at 638. Further illuminating of the issue, the West Virginia federal
24 court in *Baxley* found that a state agency (the West Virginia Division of Corrections and
25 Rehabilitation) had control over documents of a third-party vendor (a medical contractor) such that
26 the state agency was required to search for and produce documents from that third-party, overruling
27 the state agency's objections that the third-party "is not a parent or subsidiary corporation of
28 Defendants or in any way related thereto, and Defendants do not have custody of the responsive

1 documentation.” *Baxley v. Jividen*, No. 3:18-CV-01526, 2020 WL 4282033, at *3–5 (S.D.W. Va.
2 July 27, 2020). Separateness of the entities involved is not determinative of the “control” issue.

3 Here, the attorney-client relationship between the state Attorney General and the state
4 agencies (a relationship mandated by state law) necessitates close coordination. While operational
5 control may be a factual situation which demonstrates a legal right to obtain the documents, the
6 absence of such “executive or functional control” is not determinative for evaluating “control” for
7 purposes of discovery. As discussed above, courts have found “control” for purposes of discovery
8 where a party is clearly not in managerial control over the third-party, such as a subsidiary having
9 control over the documents of a parent corporation, or an individual government officer having
10 control over the documents of an entire agency. By definition, the “legal control” issue for discovery
11 arises when there are two legally distinct or separate entities – otherwise, if only one entity were
12 involved, there would be no dispute that party discovery covered that one entity. Thus, arguing that
13 the West Virginia Attorney General is not suing on behalf of or representing any state agency in this
14 litigation, and arguing that the “COPPA claim is not reliant on or related to any state agencies’
15 claim(s)[.]” dkt. 738-35 at 2, is simply re-stating the issue to be decided, and not determinative of
16 the issue. While operational control may be a factual situation which demonstrates a legal right to
17 obtain the documents, the lack of operational control is not alone determinative for evaluating
18 “control.” The West Virginia Attorney General’s arguments erroneously conflate the legal control
19 issue with “operational control” or “functional independence” of each entity, and thus is insufficient
20 to rebut a finding of legal control of the documents for purposes of discovery.

21 Therefore, the Court concludes that the West Virginia Attorney General has legal control,
22 for the purposes of discovery, over the documents held by the West Virginia agencies listed by Meta.

23 **XXXV. WISCONSIN**

24 In opposition to the control issue, the Wisconsin Attorney General’s primary argument is
25 that: the Wisconsin Attorney General only has powers prescribed by law and no such law proscribes
26 the Wisconsin Attorney General to be able to access the documents of Wisconsin agencies. [Dkt.
27 738-36 at 2].

28 In support of a finding of control with regard to these state agencies’ documents, Meta argues

1 based primarily on the following factors: the Wisconsin Attorney General has already confirmed
2 that it is acting as counsel to the Wisconsin Governor in this litigation and that all but one of the
3 listed agencies are controlled by the Wisconsin Governor. *Id.* at 3. Here, Meta seeks discovery
4 from the following agencies: the Department of Administration, Department of Children and
5 Families, Department of Health, Department of Public Instruction, Department of Children’s Mental
6 Health, and Office of the Governor. *Id.*

7 After considering the briefing, the Court finds that the factors weigh in favor of a finding
8 that the Wisconsin Attorney General does have legal control, for the purposes of discovery, over the
9 listed Wisconsin agencies. Specifically, it has legal control, for the purposes of discovery, over the
10 listed Wisconsin agencies that are controlled by the Wisconsin Governor because the Wisconsin
11 Attorney General is acting as counsel in this litigation for the Wisconsin Governor. As discussed
12 above, no separate counsel has appeared for any Wisconsin agencies. Accordingly, on the record
13 presented to the Court, it appears that the Wisconsin Attorney General (a) has admitted it has been
14 and will represent the Wisconsin Governor in this action, and (b) will represent the Wisconsin
15 agencies controlled by the Governor.

16 The statutory scheme in Wisconsin requires that the Wisconsin Attorney General through
17 the Wisconsin Department of Justice “*shall . . . appear for the state and prosecute or defend all*
18 *actions and proceedings, civil or criminal, in the court of appeals and the supreme court, in which*
19 *the state is interested or a party, and attend to and prosecute or defend all civil cases sent or remanded*
20 *to any circuit court in which the state is a party.”* Wis. Stat. § 165.25(1) (emphasis added).
21 Additionally, the Wisconsin Attorney General “*shall . . . [i]f requested by the governor or either*
22 *house of the legislature, **appear for and represent** the state, **any state department, agency**, official,*
23 *employee or agent, whether required to appear as a party or witness **in any civil** or criminal **matter**,*
24 *and prosecute or defend in any court or before any officer, any cause or matter, civil or criminal, in*
25 *which the state or the people of this state may be interested.”* Wis. Stat. § 165.25(1m) (emphasis
26 added).

27 Indeed, the Wisconsin Attorney General confirmed that its office could represent the
28 Wisconsin agencies at issue if Meta were to serve those agencies with a subpoena in this matter.

[Dkt. 738-1 at 31–32]. Additionally, the Wisconsin Attorney General has (through artful language) confirmed that it has acted as counsel to the Governor in this litigation. Dkt. 738-36 at 2 (“Here, with respect to this litigation *and with the exception of the governor, the [Wisconsin Attorney General] has not acted as counsel* to any of the agencies identified by Meta in the Joint Chart.”) (emphasis added). The Wisconsin Attorney General further concedes that all the agencies in the chart are run by a secretary (or in one instance, a director), who each are appointed by the Governor. *Id.* Under Wisconsin law, all secretaries “serve at the pleasure of the governor.” Wis. Stat. § 15.05(1)(a). Similarly, the director of the Office of Children’s Mental Health is run by a director who shall likewise “serve at the pleasure of the governor.” Wis. Stat. § 15.194(1). Because each of these agencies are run by appointees of the Governor and serve at the Governor’s pleasure, their choices of counsel will clearly be determined by the Governor. And because the Wisconsin Attorney General has been and will represent the Governor in this case already and no other counsel has entered appearance for the state agencies, it is not surprising that the Wisconsin Attorney General would also thus represent these state agencies.

Accordingly, it appears that under the statutory scheme each agency will be represented by the Wisconsin Attorney General in this matter for discovery. While the Wisconsin Attorney General argues that there is no statute that expressly grants that office the right to access agencies’ documents, the Wisconsin Attorney General cites no law which prohibits the Wisconsin Attorney General from accessing any agency documents. This arrangement indicates strongly that the Wisconsin Attorney General, in fulfilling its statutory role as counsel for the Governor and the state agencies, would necessarily and inherently have access to and control over the necessary documents for effective legal representation of these state agencies.

Relatedly, the Wisconsin Attorney General has taken the position that communications between the Wisconsin Attorney General and these state agencies would be covered by the attorney-client privilege “where the AG is serving as legal counsel for a state agency.” [Dkt. 738-36 at 2]. To the extent the Wisconsin Attorney General indicates that “a review will be undertaken to determine whether a legal privilege will apply,” that indicates that the Wisconsin Attorney General is attempting to preserve the ability to assert the attorney-client privilege between the Wisconsin

1 Attorney General's office and the agencies at issue, and that position further supports the conclusion
2 of control here. Assertion of the attorney-client privilege requires, as a prerequisite, the existence
3 of an attorney-client relationship. *See Graf*, 610 F.3d at 1156. And, as discussed above, "[i]n
4 general, an attorney is presumed to have control over documents in its client's possession." *Perez*,
5 2014 WL 1796661, at *2. There is no showing here to rebut that presumption.

6 The Wisconsin Attorney General cites no law which prohibits the Wisconsin Attorney
7 General from serving as counsel for the state agencies at issue. Indeed, the Wisconsin Attorney
8 General's role as counsel for the agencies at issue inherently involves obtaining necessary
9 documents for effective representation in litigation. In acting as counsel, the Wisconsin Attorney
10 General would necessarily have access to and thus control over the relevant documents needed to
11 respond to discovery requests. *See Monsanto*, 2023 WL 4083934, at *5–6 (finding state Attorney
12 General has control over agency documents "based on his broad statutory and common law powers
13 to control and manage legal affairs on behalf of state agencies, has a legal right to obtain responsive
14 documents from the state agencies referenced in the Complaint").

15 Further, the Wisconsin Attorney General argues that the Wisconsin Attorney General is a
16 separate and distinct elected entity with "executive control over only one agency of state
17 government: the Wisconsin Department of Justice." *See* Dkt. 738-36 at 2 (citations omitted).
18 However, this argument misapprehends the "legal control" test for documents – the issue is not
19 simply whether one entity is under the day-to-day "executive control" of the other (such as a parent-
20 wholly-owned-subsidary relationship), and not simply whether the two entities are legally separate
21 (such as two different and separately incorporated entities), but rather whether there is a legal right
22 to obtain the documents as explained by *Citric Acid*. "The control analysis for Rule 34 purposes
23 does not require the party to have actual managerial power over the foreign corporation, but rather
24 that there be close coordination between them." *St. Jude Medical S.C., Inc.*, 305 F.R.D. at 638.
25 Here, the attorney-client relationship between the state Attorney General and the state agencies (a
26 relationship mandated by state law) necessitates close coordination. While operational control may
27 be a factual situation which demonstrates a legal right to obtain the documents, the absence of such
28 "executive or functional control" is not determinative for evaluating "control" for purposes of

1 discovery. By definition, the “legal control” issue for discovery arises when there are two legally
2 distinct or separate entities – otherwise, if only one entity were involved, there would be no dispute
3 that party discovery covered that one entity. As discussed above, courts have found “control” for
4 purposes of discovery where a party is clearly not in managerial control over the third-party, such
5 as a subsidiary having control over the documents of a parent corporation, or an individual
6 government officer having control over the documents of an entire agency.

7 The Western District of Wisconsin’s opinion in *Perez v. Frank*, No. 06-C-248-C, 2006 WL
8 6040464, at *1 (W.D. Wis. Nov. 27, 2006), is instructive. In *Perez*, the plaintiff was suing several
9 individual defendants who were officials within the Wisconsin Department of Corrections. *Id.* In
10 that case, the plaintiff requested issuance of a subpoena for documents directed to the Department
11 of Corrections. *Id.* The Wisconsin Court denied the request, tellingly, because “[b]efore I issue the
12 requested subpoena to plaintiff, it will be necessary for him to advise the court why he believes the
13 documents he wants ***are not in the control of the defendants in light of the fact that they appear***
14 ***to be documents belonging to the Department of Corrections.*** If the documents plaintiff seeks to
15 inspect are in the control of the defendants, then he should request the production of documents
16 pursuant to Fed. R. Civ. P. 34.” *Id.* In *Perez*, the defendants were represented by the Wisconsin
17 Attorney General. *Id.* Thus, the holding in *Perez*, known to the Wisconsin Attorney General’s
18 office, is that a Wisconsin federal judge has recognized that individuals, employed by a state agency,
19 but none of whom are alleged to be in “executive control” of that agency, have sufficient apparent
20 control of agency documents such that a subpoena is unnecessary and that party discovery is the
21 appropriate procedural vehicle for document discovery. The *Perez* ruling thus by analogy
22 persuasively supports this Court’s conclusions on control regarding documents in this case for the
23 Wisconsin agencies. *Cf. also Trane Co. v. Klutznick*, 87 F.R.D. 473, 476–78 (W.D. Wis. 1980)
24 (finding named defendant, President of the United States, has control over information in the hands
25 of non-party agencies such that supplemental interrogatory responses are ordered).

26 Finally, the Court has recognized that the issue of control of state agency documents, when
27 a State or State Attorney General is a party, has been litigated and decided in a previous Multi-
28 District Litigation involving most of the same States and State Attorneys General as are involved in

1 this case. *Generic Pharmaceuticals (II)*, 699 F. Supp. 3d at 357–58. The *Generic Pharmaceuticals*
2 (*II*) opinion not only ruled against the objecting States, but also helpfully identified numerous States
3 which withdrew their objections to party discovery and negotiated a resolution of this issue with the
4 opposing party there. *Id.* at 356 n.5. In that case, Wisconsin is identified as one of the States which
5 reached agreement on the state agency control issue without requiring that court to expend resources
6 resolving the dispute there. *Id.* Given that the *Generic Pharmaceuticals (II)* opinion resolved the
7 control issue against all the remaining objecting states and given that Wisconsin was able to reach
8 a negotiated resolution of the dispute in that Multi-District Litigation, this Court is disappointed that
9 the Wisconsin Attorney General and Meta were unable to reach a negotiated resolution of this
10 dispute. As the Court has repeatedly encouraged the Parties at multiple Discovery Management
11 Conferences, they should make every effort to work out discovery disputes through reasonable,
12 good faith negotiations between able and experienced counsel, particularly where, as here, there is
13 guidance in precedent on the discovery issue at hand.

14 Therefore, the Court concludes that the Wisconsin Attorney General has legal control, for
15 the purposes of discovery, over the documents held by the Wisconsin agencies listed by Meta.

16 ADMINISTRATIVE MOTIONS

17 As discussed above, the State Attorneys General filed an Administrative Motion for Leave
18 to File Supplemental Information, a Second Administrative Motion for Leave to File Supplemental
19 Information, and a Third Administrative Motion for Leave to File Supplemental Information. [Dkts.
20 1031, 1074, 1110]. All three seek leave to file information that Meta has served notices of its intent
21 to serve subpoenas on some of the agencies at issue. *Id.* Meta's Response to the first Administrative
22 Motion indicates that Meta does not object to the submission of these subpoenas as supplemental
23 information and made clear its position that service of these subpoenas was being conducting
24 without waiving Meta's position that the state agencies should be subject to party discovery. [Dkt.
25 1035 at 2]. As of the date of this Order, Meta takes no position with regard to the Second
26 Administrative Motion, and the Court presumes that Meta's position would be the same as with
27 respect to the First and Third Administrative Motion in any event. [Dkt. 1074 at 6; Dkt. 1110]. No
28 opposition on the merits being filed, the Court **GRANTS** all three Administrative Motions.

CONCLUSION

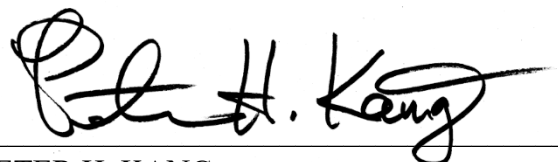
The Court is disappointed that the Parties were incapable of reaching a negotiated resolution of this "control" issue, but rather required the Court to expend its valuable resources analyzing over thirty-five briefs on this "control" issue (where the State Attorneys General requested that the issues here required separate briefing for each State), conduct multiple hearings on this issue (where ultimately only a handful of the States presented oral argument), and prepare this admittedly lengthy Order (where, as discussed above, a large number of the arguments overlapped and repeated, with only slight variations, from state to state). Indeed, rather than reaching negotiated resolution of this issue as in *Generic Pharmaceuticals (II)*, the Attorneys General of multiple states here preemptively declared at oral argument their intent to appeal any adverse ruling on "control" before they even saw this Order or this Court's reasoning (and where the Court did not rule from the bench). The detailed discussion in this Order is intended, hopefully, to facilitate any later review. The Court again reminds counsel for all Parties of their duties under Fed. R. Civ. P. 1 and 26 to work collaboratively for the efficient progress of this case, and to avoid unduly multiplying the proceedings.

For all reasons discussed herein, Meta's motion to compel the State Attorneys General to include the identified state agencies within the scope of party discovery is **GRANTED-IN-PART** and **DENIED-IN-PART** consistent with this Order.

The Parties (including counsel for the State Agencies) are **ORDERED** to promptly meet and confer regarding a mutually agreeable and reasonable date for the State Agencies to substantially complete their respective productions of documents in response to either the Rule 34 requests or, to the extent applicable, Rule 45 subpoenas. The Parties shall include a summary report on the status of State Agency discovery in the Discovery Management Conference reports going forward.

IT IS SO ORDERED.

Dated: September 6, 2024



PETER H. KANG
United States Magistrate Judge